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VERTICAL DISTRIBUTION RESTRAINTS AND THE TEXAS ANTITRUST LAWS

by
*J. Michael Weston**

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PERSONS who sell products or services in Texas must be cognizant of three not necessarily consistent bodies of antitrust law. The first body of law contains the federal antitrust statutes¹ and includes the Sherman Act, the Clayton Act, the Robinson-Patman Act, and the Federal Trade Commission Act. Violations of these laws can result in criminal and civil penalties as well as in private treble damages actions.² The second and third bodies of law are the Texas antitrust laws. The first of these Texas statutes has recently been repealed and governs transactions occurring before August 29, 1983.³ Violation of the old Texas statute may result

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1. 15 U.S.C. §§ 1-77 (1976 & Supp. V 1981).

2. The sanctions for violations range from felony prosecutions, 15 U.S.C. §§ 1-2 (1976); to treble damages actions, *id.* § 15 (Supp. V 1981); civil penalty actions, *id.* § 45(1) (Supp. V 1981); and injunctive relief, *id.* § 26 (1976). Although relegated to a secondary position in this Article, the federal antitrust laws should always be of primary concern in evaluating the legality of any business activity, particularly given the passage of the new Texas antitrust statute.

3. TEX. BUS. & COM. CODE ANN. §§ 15.01-40 (Vernon 1968 & Supp. 1982-1983), *re-*

in one of a number of possible sanctions.⁴ In practice, the most common sanction is a declaration that an entire transaction is void and unenforceable.⁵ The third body of law, the new Texas antitrust statute,⁶ is untested, but is intended to bring Texas law into line with federal judicial interpretations of comparable federal antitrust statutes.⁷ Violations of the new Texas antitrust laws may give rise to a number of sanctions, including actions for actual damages plus attorneys' fees and costs, or, if the illegal conduct was "willful or flagrant," treble damages and costs plus reasonable attorneys' fees,⁸ and to actions for injunctive relief.⁹

The federal antitrust restrictions imposed upon vertical distribution arrangements have lessened in the years following the United States

pealed in part and amended in part by Texas Free Enterprise and Antitrust Act, §§ 1-3 (June 20, 1983) [hereinafter cited to codification currently in print].

4. The repealed Texas antitrust statute does not provide for statutory treble damages, but actual exemplary damages may be recoverable. *Frels v. Consol. Theatres*, 134 S.W.2d 369, 369 (Tex. Civ. App.—San Antonio 1939, writ *dism'd* *judgmt* *cor.*); *Texas Pub. Utils. Corp. v. Edwards*, 99 S.W.2d 420, 427 (Tex. Civ. App.—Austin 1936, writ *dism'd*); *North Tex. Gin Co. v. Thomas*, 277 S.W. 438, 440 (Tex. Civ. App.—Dallas 1925, writ *ref'd*); *see Erickson v. Times Herald Printing Co.*, 271 S.W.2d 329, 332 (Tex. Civ. App.—Dallas 1954, writ *ref'd* n.r.e.); *see also Leslie v. Houston Natural Gas Corp.*, 280 S.W.2d 353, 360 (Tex. Civ. App.—Galveston 1955, writ *ref'd* n.r.e.) (damages recoverable upon showing of injury and statutory violation), *cert. denied*, 352 U.S. 820 (1956). Additionally, the state may seek civil and criminal sanctions. TEX. BUS. & COM. CODE ANN. §§ 15.28-33 (Vernon 1968). Most importantly, an agreement containing a provision in violation of the Texas antitrust laws is void under the old statute. *Id.* § 15.04(b).

5. The fact that a contract is void will preclude any recovery based on rights derivative of that contract. *See Climatic Air Distribs. v. Climatic Air Sales, Inc.*, 162 Tex. 237, 241, 345 S.W.2d 702, 704 (1961). This means that a seller cannot recover for goods it sold if it must refer to the illegal agreement in any way to recover. *See W.T. Rawleigh Co. v. Land*, 115 Tex. 319, 330, 279 S.W. 810, 814 (1926); *Federal Parts Corp. v. Robert Bosch Corp.*, 604 S.W.2d 367, 368 (Tex. Civ. App.—Fort Worth 1980, writ *ref'd* n.r.e.); *Graphilter Corp. v. Vinson*, 518 S.W.2d 952, 955 (Tex. Civ. App.—Dallas 1975, writ *ref'd* n.r.e.) (seller could not recover for amounts sold in excess of that contracted for because parties' relationship was based upon illegal contract); *Kelly v. Bryson Pipeline & Ref. Co.*, 163 S.W.2d 413, 414-15 (Tex. Civ. App.—Fort Worth 1942, no writ); *Marathon Oil Co. v. Hadley*, 107 S.W.2d 883, 886 (Tex. Civ. App.—Fort Worth 1935, writ *dism'd*). *But see Mandril v. Kasishke*, 620 S.W.2d 238 (Tex. Civ. App.—Amarillo 1981, writ *ref'd* n.r.e.) (cause of action not based upon illegal contract). Under federal law, and presumably the new statute, a seller may recover unless enforcement of the illegal contract would "make the courts a party to carrying out of one of the very restraints forbidden by the Sherman Act." *Kelly v. Kosuga*, 358 U.S. 516, 520 (1959).

6. Texas Free Enterprise and Antitrust Act (June 20, 1983) (to be codified at TEX. BUS. & COM. CODE ANN. §§ 15.01-.26) [hereinafter cited as Antitrust Act by section number].

7. Antitrust Act § 1 (to be codified at TEX. BUS. & COM. CODE ANN. § 15.04).

8. *Id.* § 3 (to be codified at TEX. BUS. & COM. CODE ANN. § 15.21(a)(1)). A damages suit brought in "bad faith or for the purpose of harassment" will result in the award of a reasonable attorney's fee, and costs to the defendants. *Id.* (to be codified at TEX. BUS. & COM. CODE ANN. § 15.21(a)(3)).

9. *Id.* (to be codified at TEX. BUS. & COM. CODE ANN. § 15.21(b)).

A significant change in the new statute is that, unlike the repealed statute, the new statute does not provide that a contract in violation of the statute is void. *Cf.* TEX. BUS. & COM. CODE ANN. § 15.04(b) (Vernon 1968). The new statute does provide for civil fines of up to \$1,000,000 for a corporation or up to \$100,000 for any other person, Antitrust Act § 3 (to be codified at TEX. BUS. & COM. CODE ANN. § 15.20(a)); and felony criminal sanctions with a maximum confinement of three years or a fine of not more than \$5000, or both, *id.* (to be codified at TEX. BUS. & COM. CODE ANN. § 15.22(a)).

Supreme Court's decision in *Continental T.V. v. GTE Sylvania*.¹⁰ This Article examines such vertical distribution arrangements under both the old and new Texas antitrust statutes.¹¹ The Article is divided into four sections. The first section provides a brief history of the Texas antitrust laws and a synopsis of the two Texas antitrust statutes. The second section discusses the scope of the Texas antitrust laws. Since the repealed Texas antitrust statute does not encompass all areas of Texas commerce, one must identify those areas of commerce that are subject to the laws. The third section evaluates various types of business activity in the context of statutory and nonstatutory antitrust law. Finally, some concluding observations are offered about the present state of Texas antitrust law.

I. OVERVIEW

Early Texas Antitrust Law. The State of Texas first prohibited "monopolies" in the 1836 Declaration of Rights of the Republic of Texas.¹² That prohibition continues today in the Texas Constitution. Article I, section 26 declares that "monopolies are contrary to the genius of a free government, and shall never be allowed"¹³ This constitutional antitrust prohibition has been applied only to grants of exclusive privileges by the sovereign.¹⁴ During the industrial revolution and the Populist and Grange movements of the late nineteenth century, Texas attempted to prevent combinations in restraint of trade by private persons.¹⁵ In March 1889, some fifteen months before the United States Congress enacted the Sherman Antitrust Act, the Texas Legislature defined and prohibited "trusts."¹⁶ The original statute has undergone a number of revisions,¹⁷ but

10. 433 U.S. 36 (1977).

11. The focus is on vertical restraints because the illegality of horizontal agreements involving price fixing, bid-rigging, customer allocation, territorial allocation, and the like is not normally in dispute under federal or state law. See *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); TEX. BUS. & COM. CODE ANN. § 15.02(b)(2) (Vernon 1968). Uncertainty, however, has been the trademark of the law involving vertical restraints. The major portion of this Article relates to the repealed statutes for two reasons: first, the repealed statute governs events occurring before August 29, 1983; and, second, Texas courts will necessarily have reference to existing case law in interpreting the new statute, if for no other reason than to understand the situations the new statute was enacted to remedy.

12. REPUBLIC OF TEXAS CONST., Declaration of Rights, § 17 (1836), 1 H. GAMMEL, LAWS OF TEXAS 1084 (1898).

13. TEX. CONST. art. I, § 26.

14. See *City of Brenham v. Brenham Water Co.*, 67 Tex. 542, 554-55, 4 S.W. 143, 149 (1887); *Conley v. Daughters of the Republic of Tex.*, 151 S.W. 877, 881 (Tex. Civ. App.—San Antonio 1912), *rev'd on other grounds*, 106 Tex. 80, 156 S.W. 197 (1913); *Jones v. Carter*, 101 S.W. 514, 515-16 (Tex. Civ. App. 1907, writ ref'd).

15. See *Gulf, C. & S.F. Ry. v. State*, 72 Tex. 404, 411-12, 10 S.W. 81, 83-84 (1888); see also *Ladd v. Southern Cotton Press & Mfg. Co.*, 53 Tex. 172, 193 (1880) (private suit against a "monopoly"; court held "[i]f it is lawful for a single individual engaged in other business to prescribe the terms upon which he will conduct it, we do not see how it can become unlawful by others in the same employment agreeing with him that they will also transact their business upon the same terms")

16. Law of Mar. 30, 1889, ch. 117, 1889 Tex. Gen. Laws 141, 9 H. GAMMEL, *supra* note 12, at 1169.

17. For additional discussion of the history of the Texas antitrust laws, see FINTY,

after 1903 the substance of the statutory prohibitions remained relatively unchanged until the enactment of the Texas Free Enterprise and Antitrust Act of 1983.

The Old and New Texas Statutes. The repealed Texas antitrust statute defined and prohibited monopolies, trusts, and conspiracies in restraint of trade. These restrictions proved very confusing in application. In contrast to the federal antitrust laws, which have developed into a body of law capable of adapting to and regulating contemporary economic life, the Texas antitrust statute operated as a barrier to meaningful antitrust analysis of contemporary Texas business conditions. A review of this Texas antitrust law leads to four conclusions regarding its application. First, the statute was penal in nature and required strict and literal construction.¹⁸ Second, a particular form of business conduct or transaction could seldom be labelled with certainty as not reviewable under the statute, even though a frequently repeated maxim stated that the statute applied only to goods. Third, the practical application of the statutory prohibitions frequently elevated form over substance.¹⁹ Finally, a finding of illegality carried severe results because a contract violative of the statutes would be declared void and unenforceable.²⁰ The difficulties with the application of the former Texas antitrust statute were noted as long ago as 1936:

The statutes viewed as a whole may be said to contain internal evidence of a fumbling type of empiricism almost predestined to failure. They are characterized by vagueness of expression, uncertainty of definition, and ineptness of language. In a field of constantly changing aspect and continually increasing complexity, the attempt is made to deal with problems as if the factors were static and their discovery simple. . . .

An attempt to evaluate Texas anti-trust legislation in terms of litigation leads to a similar conclusion. Judicial interpretation has, it is believed, rendered the statute more, rather than less, obscure.²¹

Unfortunately, this lamentable situation did not improve during the intervening years. As a result, before passage of the new statute the unwary faced the risk of substantial loss and the wary modified their behavior and vocabulary to satisfy the vagaries of the Texas antitrust laws.

ANTI-TRUST LEGISLATION IN TEXAS (1916); Matthews, *History, Interpretation and Enforcement of Texas Antitrust Laws*, 1950 INST. ON ANTITRUST L. & PRICE REG. 19; Moody & Wallace, *Texas Antitrust Laws and Their Enforcement—Comparison With Federal Antitrust Laws*, 11 SW. L.J. 1 (1957); Nutting, *The Texas Anti-Trust Law: A Post Mortem*, 14 TEX. L. REV. 293 (1936).

18. See *Ford Motor Co. v. State*, 142 Tex. 5, 8-9, 175 S.W.2d 230, 233 (1943); *Sessions Co. v. W.A. Schaeffer Pen Co.*, 344 S.W.2d 180, 183 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.).

19. See *Sherrard v. After Hours, Inc.*, 464 S.W.2d 87, 89 (Tex. 1971); *Climatic Air Distribs. v. Climatic Air Sales, Inc.*, 162 Tex. 237, 243, 345 S.W.2d 702, 705 (1961).

20. TEX. BUS. & COM. CODE ANN. § 15.04(b) (Vernon 1968); see *Federal Parts Corp. v. Robert Bosch Corp.*, 604 S.W.2d 367, 370 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.).

21. Nutting, *supra* note 17, at 298.

The difficulties with the Texas antitrust law were not caused solely by poor legislative draftsmanship. Much of the confusion must be attributed to the Texas courts' blanket rejection of a rule of reason.²² The author believes that the judicial rejection of a rule of reason led Texas courts to adopt silently a *de facto* rule of reason dependent upon the form of a transaction rather than upon its substance. This subterfuge has resulted in decisions that can be explained only by the use of labels. Unquestionably, such a situation does not promote the orderly administration of justice.

The author hopes that the new statute will resolve this lamentable situation. The drafters improved the substantive portions of the antitrust statute in two basic ways. First, the legislature simplified the prohibitory language. The core provisions of the new statute are found in section 15.05, which provides that:

(a) Every contract, combination, or conspiracy in restraint of trade or commerce is unlawful.

(b) It is unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce.

(c) It is unlawful for any person to sell, lease, or contract for the sale or lease of any goods, whether patented or unpatented, for use, consumption, or resale, or to fix a price for such use, consumption, or resale, or discount from or rebate upon such price, on the condition, agreement, or understanding that the purchaser or lessee shall not use or deal in the goods of a competitor or competitors of the seller or lessor, where the effect of the condition, agreement, or understanding may be to lessen competition substantially in any line of trade or commerce.²³

Other provisions relate to stock or asset acquisitions,²⁴ the right to work, and labor union membership.²⁵ The second improvement in the new statute is its tacit recognition of the applicability of a rule of reason.²⁶

The new statute appears to have three primary purposes. The first, and most important, goal is to bring Texas antitrust law into the mainstream of United States antitrust jurisprudence.²⁷ The second purpose is to broaden

22. See *Climatic Air Distribs. v. Climatic Air Sales, Inc.*, 162 Tex. 237, 243, 345 S.W.2d 702, 705-06 (1961); *Texas & P. Coal Co. v. Lawson*, 89 Tex. 394, 400-01, 34 S.W. 919, 920 (1896) (Texas antitrust statute ignores "common law distinction between restrictions which are reasonable and those which are not It relieves the court of the difficulty of determining whether in a particular case any effect will be given such a contract by declaring that it 'shall be absolutely void, and not enforceable'"). The meaning and application of the rule of reason in federal antitrust statutes is discussed below. See *infra* notes 174-81 and accompanying text.

23. Antitrust Act § 1 (to be codified at TEX. BUS. & COM. CODE ANN. § 15.05(a)-(c)).

24. *Id.* (to be codified at TEX. BUS. & COM. CODE ANN. § 15.05(d)).

25. *Id.* (to be codified at TEX. BUS. & COM. CODE ANN. § 15.05(e)).

26. See *id.* (to be codified at TEX. BUS. & COM. CODE ANN. § 15.04) (adopting federal judicial antitrust interpretation); *id.* (to be codified at TEX. BUS. & COM. CODE ANN. § 15.05(i)) (reasonableness in context of "professional services").

27. See Antitrust Act § 1 (to be codified at TEX. BUS. & COM. CODE ANN. § 15.05). The primary prohibitory language found in § 15.05 of the new statute is taken from federal antitrust statutes. Section 15.05(a), relating to conspiracies, is taken from § 1 of the Sherman Act. 15 U.S.C. § 1 (1976). Section 15.05(b), prohibiting certain monopolies, is taken from § 2 of the Sherman Act. *Id.* § 2. Section 15.05(c), regulating tying arrangements, is taken

the scope of applicability of the Texas statute. The repealed antitrust statute contains language that makes the applicability of the statute subject to uncertainty when an alleged restraint involves other than "tangible personal property."²⁸ This uncertainty has been resolved in the new statute in favor of inclusiveness by the broad definitions of "trade and commerce," "goods," and "services."²⁹ Henceforth one must assume that a vertical distribution transaction will be subject to scrutiny under the Texas statute. The third purpose is to make the Texas attorney general an active enforcer of the antitrust laws once again.³⁰ Much of the new statute appears to have been drafted to facilitate enforcement by the Texas attorney general. Like the prohibitory sections, the enforcement provisions closely follow federal law. For example, a detailed procedure for civil investigative demands has been taken from the federal antitrust civil investigative demand provisions.³¹ The statute formalizes the procedure for granting a witness immunity from criminal prosecution.³² These changes, combined with clearer prohibitory language and meaningful criminal and civil sanctions, place the attorney general in a position to regulate better the conduct of Texas business.

As explored below, the major concern raised by the new statute is whether much has been accomplished other than the repeal of the old statute. Under existing law the federal prohibitions adopted by the new statute would have applied to most activities occurring in Texas regardless of whether the Texas statute was repealed. Moreover, the treble damage provision in the new Texas statute, which requires a "willful or flagrant" violation,³³ seemingly places a heavier burden on litigants than does federal antitrust law.³⁴ The new statute does, however, facilitate the attorney gen-

from § 3 of the Clayton Act. *Id.* § 14. Section 15.05(d), regulating stock and asset acquisitions, is taken from § 7 of the Clayton Act. *Id.* § 18 (Supp. V 1981). These new Texas antitrust provisions, interpreted consistently with federal judicial interpretations of comparable federal antitrust statutes, should place Texas into the mainstream of United States antitrust law.

It is noteworthy that the Texas Legislature eschewed § 2(a) of the Clayton Act as amended by the Robinson-Patman Act, *id.* § 13(a) (1976), and the Federal Trade Commission Act, *id.* §§ 41-51 (1976 & Supp. V 1981). The consumer protection aspects of the Federal Trade Commission Act, *id.* § 45(a)(1) (1976), however, were relied on by the Texas Legislature in the passage of the Deceptive Trade Practices—Consumer Protection Act. TEX. BUS. & COM. CODE ANN. § 17.46(c)(1) (Vernon Supp. 1982-1983).

28. See TEX. BUS. & COM. CODE ANN. § 15.03(a) (Vernon 1968).

29. Antitrust Act § 1 (to be codified at TEX. BUS. & COM. CODE ANN. § 15.03).

30. Interestingly, even though the body of Texas antitrust law was anomalous, the Texas attorney general was one of the most active antitrust enforcement agencies in the United States for many years. See Moody & Wallace, *supra* note 17, at 2.

31. Compare *id.* § 2 (to be codified at TEX. BUS. & COM. CODE ANN. §§ 15.10-.12); with 15 U.S.C. §§ 9-16 (1976 & Supp. V 1981). The Texas civil investigative demand is inapplicable to proprietorships and partnerships with annual gross incomes of less than \$5,000,000. Antitrust Act § 2 (to be codified at TEX. BUS. & COM. CODE ANN. § 15.10(b)).

32. *Id.* § 2 (to be codified at TEX. BUS. & COM. CODE ANN. § 15.13). Again, federal law appears to have supplied the model for the new Texas provision. Compare *id.*; with 18 U.S.C. §§ 6001-6005 (1976 & Supp. V 1981).

33. Antitrust Act § 1 (to be codified at TEX. BUS. & COM. CODE ANN. § 15.21(a)(1)).

34. An interesting interpretive problem faces Texas courts in determining whether conduct is "willful or flagrant," because a plaintiff will probably need to prove, at least for a

eral's power to enforce antitrust laws, an end apparently sought by the Texas Legislature. Thus the author believes that the future of the new Texas statute lies with the attorney general.

II. THE SCOPE OF THE TEXAS ANTITRUST STATUTES

When examining an activity for Texas antitrust implications, one must first review the statutes to determine which, if any, of the provisions are applicable. Under the new statute this task is relatively simple, for as the United States Supreme Court noted with respect to the Sherman Act, "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence."³⁵ Therefore, section 15.05(a) of the new statute arguably applies to vertical distribution arrangements.³⁶ Determining whether the other provisions of the new statute apply is a more complicated task and is, for the most part, beyond the scope of this Article.³⁷ The determination of whether an activity is within the scope of the old statute is not so simple. Two steps are necessary. First, an activity must be classified by type of potential violation under each section of the statute; clearly, if a transaction is one of price fixing, the prohibitions against boycott should be irrelevant.³⁸ Having determined which prohibitions may apply, the second step is to determine whether those provisions contain limiting language that precludes application to the specific business activity under scrutiny. Under the old statute, in the context of vertical distribution arrangements, the result of such a review generally is either assurance that the transaction is illegal or utter confusion. The author

violation of new § 15.05(a), that the defendants intentionally participated in a combination or conspiracy. *See* *Arkansas Fuel Oil Co. v. State*, 154 Tex. 573, 577, 280 S.W.2d 723, 725 (1955); Antitrust Act § 1 (to be codified at TEX. BUS. & COM. CODE ANN. § 15.05(a)). Whether intentionally combining to do an act is different from engaging in willful or flagrant conduct is unclear. Possibly, the phrase "willful or flagrant" does not refer to the intent to agree, but to the intent to effectuate the object of the conspiracy. *See* *United States v. United States Gypsum Co.*, 438 U.S. 422, 443-46 (1978). Alternatively, a court could construe "willful or flagrant" to be equivalent to the common law definition of malice.

35. *Board of Trade v. United States*, 246 U.S. 231, 238 (1918). The remainder of the quotation relates to the necessity of a rule of reason in the antitrust arena: "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Id.*

36. An arrangement between a manufacturer or supplier and a customer perforce involves an agreement subject to new § 15.05(a). Antitrust Act § 1 (to be codified at TEX. BUS. & COM. CODE ANN. § 15.05(a)).

37. Due to the nature of vertical distribution restraints, a combination or conspiracy is present almost by definition when a manufacturer or supplier reaches an agreement with a customer. Thus, new § 15.05(a) is the statutory provision that will be of primary concern in this Article. For example, under § 15.05(b), Antitrust Act § 1, two persons arguably might be engaged in a conspiracy to monopolize, but at the same time they also would be subject to § 15.05(a). The same holds true for arrangements under § 15.05(c), *id.*, although the application of this section can become important. For a detailed discussion of the application of § 2 of the Sherman Act, 15 U.S.C. § 2 (1976), and § 3 of the Clayton Act, *id.* § 14, the counterparts of § 15.05(b)-(c), see 16B J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION (1983).

38. Care, however, must be taken to examine all possible implications of the activity because an aggrieved party may allege he was boycotted for refusing to fix prices.

hopes that such a review under the new statute will lead to a more certain conclusion.³⁹

Perhaps the most pertinent comment to make about the scope of the former Texas antitrust statute is to note what it is not. Unlike the Sherman Antitrust Act, the former Texas antitrust statute is not "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."⁴⁰ Rather, the former Texas statute is a narrowly drafted body of law that prohibits businesses engaged in the sale of goods in Texas from entering into certain types of agreements. The repealed Texas statute attempts to specify, as precisely as possible, what activity is prohibited. The new statute contains broad prohibitions. The elements of combination⁴¹ and of intrastate commerce, however, are common to both statutes.⁴² Additionally, under the old statute the absence of certain other elements will render specific prohibitions inapplicable. These specific elements include "trade, commerce, aids to commerce,"⁴³ "tangible personal property,"⁴⁴ and sale.⁴⁵ In order to present a clearer picture of the changes made by the new statute, the specific elements required by the repealed statute will be discussed in conjunction with the comparable, but broader, terms of the new statute.

A. *The Combination Requirement*

The new antitrust statute requires a contract, combination, or conspiracy for a violation of section 15.05(a),⁴⁶ a conspiracy for a violation of one phase of section 15.05(b),⁴⁷ and a condition, agreement, or understanding for a violation of section 15.05(c).⁴⁸ The repealed antitrust provisions also contain a combination requirement. Former section 15.01, defining monopolies, and former section 15.02, defining trusts, both explicitly require a combination.⁴⁹ Former section 15.03 condemns conspiracies;⁵⁰ a conspiracy is "a combination of two or more persons to accomplish an unlawful

39. The new statute has resolved a major area of concern and uncertainty by adopting a broad definition of trade or commerce. "The terms 'trade' and 'commerce' mean the sale, purchase, lease, exchange, or distribution of any goods or services . . ." Antitrust Act § 1, 1983 Tex. Sess. Law Serv. at — (Vernon) (to be codified at TEX. BUS. & COM. CODE ANN. § 15.03(e)).

40. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958).

41. *E.g.*, Antitrust Act § 1 (to be codified at TEX. BUS. & COM. CODE ANN. § 15.05(a)); TEX. BUS. & COM. CODE ANN. § 15.01 (Vernon 1968).

42. *E.g.*, Antitrust Act § 1 (to be codified at TEX. BUS. & COM. CODE ANN. § 15.04); *see M.I.I. v. E.F.I., Inc.*, 550 S.W.2d 401, 404 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ *ref'd n.r.e.*), *cert. denied*, 435 U.S. 1008 (1978).

43. TEX. BUS. & COM. CODE ANN. § 15.02(b)(1), (3) (Vernon 1968).

44. *Id.* §§ 15.02(b), 15.03(a).

45. *Id.* § 15.02(b)(2)-(3), (5)-(7); *see Cunningham v. Frito Co.*, 198 S.W.2d 772, 775-76 (Tex. Civ. App.—San Antonio 1946, no writ).

46. Antitrust Act § 1 (to be codified at TEX. BUS. & COM. CODE ANN. § 15.05(a)).

47. *Id.* (to be codified at TEX. BUS. & COM. CODE ANN. § 15.05(b)).

48. *Id.* (to be codified at TEX. BUS. & COM. CODE ANN. § 15.05(c)).

49. TEX. BUS. & COM. CODE ANN. §§ 15.01, 15.02(b) (Vernon 1968).

50. *Id.* § 15.03.

purpose, or to accomplish a lawful purpose by unlawful means."⁵¹ Thus, in most instances a violation of either the old or the new Texas antitrust statutes requires a combination.⁵²

Although the new statute will be construed in harmony with federal judicial interpretation, Texas courts will most probably also refer to prior Texas judicial interpretations of combinations.⁵³ The accepted Texas definition of an antitrust combination, contained in *Arkansas Fuel Oil Co. v. State*,⁵⁴ states:

Since the antitrust laws are penal, the word *combination* . . . means an intentional combination reached by an agreement and consent and does not mean a situation thrust upon an accused to which he did not consent or agree. Intent to violate is still a bedrock requirement of any penal law. Of course intent may be proved by circumstantial evidence, but the final judgment must be bottomed upon a finding of specific acts done intentionally for an illegal purpose.⁵⁵

If a contract between a supplier or manufacturer and a distributor or purchaser contains a suspect arrangement, the combination requirement has been satisfied.⁵⁶ Under both the new and old statutes, in a situation where none of the clauses of a contract, in and of themselves, are illegal but an anticompetitive effect occurs, the circumstances of the parties' relationship will determine whether an illegal combination exists.⁵⁷ In *Ford Motor Co. v. State*⁵⁸ the Texas Supreme Court held that any intentional course of

51. *State v. Standard Oil Co.*, 130 Tex. 313, 329, 107 S.W.2d 550, 559 (1937).

52. The exceptions are under the monopolization and attempt to monopolize provisions of § 15.05(b). See Antitrust Act § 1 (to be codified at TEX. BUS. & COM. CODE ANN. § 15.05(b)) (counterpart to § 2 of Sherman Act, 15 U.S.C. § 2 (1976)).

53. In any event, with respect to the definitions of antitrust conspiracies Texas and federal law are similar. Compare *Arkansas Fuel Oil Co. v. State*, 154 Tex. 573, 577, 280 S.W.2d 723, 725 (1955) (combination means "international combination reached by agreement and consent," not "situation thrust upon an accused" without consent or agreement); with *Pearl Brewing Co. v. Anheuser Busch, Inc.*, 339 F. Supp. 945, 950-951 (S.D. Tex. 1972) (combination is "union or association of two or more persons for the achieving of a common object").

54. 154 Tex. 573, 280 S.W.2d 723 (1955).

55. *Id.* at 577, 280 S.W.2d at 725 (citations omitted; emphasis in original).

56. See, e.g., *Sherrard v. After Hours, Inc.*, 464 S.W.2d 87, 89 (Tex. 1971). The court stated:

A manufacture may sell his product to whomever he pleases and he may choose to place only one or two or three distributors in any particular city. He may talk of his plans or make promises in this connection. His promises of any nature will become actionable only as terms of a contract If the promise is a term of a contract by which the supplier binds himself to sell to only one distributor for an exclusive territory, the contract is unenforceable.

Id. That is, when the terms are agreed to, a combination will be found.

57. See *Ford Motor Co. v. State*, 142 Tex. 5, 9, 175 S.W.2d 230, 233 (1943); *W.T. Rawleigh Co. v. Land*, 115 Tex. 319, 324-25, 279 S.W. 810, 811 (1926); *Vann v. Toby*, 260 S.W.2d 114, 117 (Tex. Civ. App.—Dallas 1953, writ ref'd n.r.e.); *Burpee Can Sealer Co. v. Henry McDonnell Co.*, 75 S.W.2d 458, 460 (Tex. Civ. App.—El Paso 1934, writ ref'd); *W.T. Rawleigh Co. v. Gober*, 3 S.W.2d 845, 846 (Tex. Civ. App.—Waco 1928, no writ); *W.T. Rawleigh Co. v. Fish*, 290 S.W. 798, 800 (Tex. Civ. App.—Eastland 1927, writ dism'd); *McConnon & Co. v. Marshall*, 280 S.W. 323 (Tex. Civ. App.—Texarkana 1926, no writ); *W.T. Rawleigh Co. v. Marshall*, 248 S.W. 153, 154-55 (Tex. Civ. App.—Austin 1922, no writ); *W.T. Rawleigh Co. v. Lemon*, 247 S.W. 683, 683-84 (Tex. Civ. App.—Amarillo 1923, no writ).

58. 142 Tex. 5, 175 S.W.2d 230 (1943).

conduct by the parties to a contract that allows the seller to dictate or control the resale price in Texas of goods or products sold by him, or that enables the seller to force the purchaser to limit his resales to a restricted territory in Texas, violates the antitrust laws.⁵⁹ Stated differently, a contract may be legal on its face but illegal as performed.⁶⁰ The intentional conduct leading to the finding of a combination is frequently that of the manufacturer or supplier alone.⁶¹ In these cases, even though the contract was legal on its face, the courts found a combination because the manufacturer or supplier imposed illegal conditions upon its customer.⁶²

The term "combination" is limited with respect to persons who can combine. The Texas Supreme Court held in 1897 that an illegal combination occurs "where the parties in the particular case designed the united co-operation of such agencies, which might have been otherwise independent and competing," to accomplish an illegal purpose.⁶³ This definition has been

59. *Id.* at 9, 175 S.W.2d at 233.

60. See *Mendelovitz v. Adolph Coors Co.*, 693 F.2d 570, 579 (5th Cir. 1982); *Henderson Tire & Rubber Co. v. Roberts*, 12 S.W.2d 154, 155 (Tex. Comm'n App. 1929, judgment adopted) ("agency" contract deemed "sale").

61. Compare *W.T. Rawleigh Co. v. Harper*, 17 S.W.2d 455, 455-56 (Tex. Comm'n App. 1929, judgment adopted) (contract requiring party to devote entire skill to selling goods, but not restricting territory or setting price, held not to violate antitrust laws); *W.T. Rawleigh Co. v. Fletcher*, 275 S.W. 210, 210 (Tex. Civ. App.—Texarkana 1925, no writ) (supplier's suggested price not violation of antitrust laws); with *W.T. Rawleigh Co. v. Hudson*, 290 S.W. 775, 776 (Tex. Civ. App.—El Paso 1926, no writ) (exclusive territory, exclusive dealing, and fixed resale prices violated antitrust laws); *Caddell v. J.R. Watkins Medical Co.*, 227 S.W. 226, 228 (Tex. Civ. App.—San Antonio 1921, no writ) (contract limiting resale to prescribed territory, fixing price, or requiring retailer to devote all his time to that good is invalid); *Whisenant v. Shores-Mueller Co.*, 194 S.W. 1175, 1177 (Tex. Civ. App.—El Paso 1917, writ dismissed) (implied agreement of buyer after signing contract, but before shipment of goods, not to sell outside certain territory violates antitrust laws).

62. See *Whisenant v. Shores-Mueller Co.*, 194 S.W. 1175, 1177 (Tex. Civ. App.—El Paso 1917, writ dismissed). For the federal view on these issues, which is similar to that under the former Texas statute, see *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 140-41 (1968); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 45-47 (1960).

63. *Gates v. Hooper*, 90 Tex. 563, 565, 39 S.W. 1079, 1080 (1897); see also *Cliff Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 205-06 (5th Cir. 1969) (affiliate or subsidiary corporations cannot conspire within act); *State v. Fairbanks-Morse & Co.*, 246 S.W.2d 647, 654-56 (Tex. Civ. App.—Dallas 1951, writ refused n.r.e.) (combination definition does not apply to en masse construction work); *Padgett v. Lone Star Gas Co.*, 213 S.W.2d 133, 136 (Tex. Civ. App.—Dallas 1948, no writ) (no combination unless persons are independent and capable of acting in competition with one another); *Bomar v. Smith*, 195 S.W. 964, 978-80 (Tex. Civ. App.—Dallas 1917, no writ) (no antitrust violation when neither capital, skill, nor acts are combined to shut down competition); *Comer v. Burton-Lingo Co.*, 58 S.W. 969, 969-70 (Tex. Civ. App. 1900, no writ) (combination of capital or skill formed to create restriction in trade void under antitrust law). The state of federal judicial interpretation of "combinations" is complex and not necessarily consistent among the various circuit courts. See L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 323-29 (1977). According to the United States Supreme Court and Fifth Circuit Court of Appeals, a corporation generally cannot conspire with its employees or officers. *H & B Equip. Co. v. International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1977); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953); see *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 469-70 (1962). A corporation cannot conspire with its wholly owned, unincorporated sales division. *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 205-06 (5th Cir. 1969). Separately incorporated subsidiaries, especially when competing, can, however, conspire with each other. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951); *United States v. Yellow Cab Co.*, 332 U.S. 218, 229 (1947); *H & B Equipment*

held to exclude agreements between the parties to the sale of a business,⁶⁴ an agent and a principal,⁶⁵ an employer and an employee,⁶⁶ a parent corporation and its wholly owned unincorporated division,⁶⁷ a consignor and a consignee,⁶⁸ and parties whose interests were antagonistic.⁶⁹

B. *The Intrastate Commerce Requirement*

Under our federal system few transactions involving commerce fail to affect both interstate and intrastate commerce.⁷⁰ This duality occurs in the antitrust arena. Federal courts have subject matter jurisdiction over Sherman Act claims, over Federal Trade Commission Act claims since 1975 if the transaction affects commerce,⁷¹ and over Robinson-Patman Act and Clayton Act claims if those claims involve transactions that are "in commerce."⁷² Normally, the fact that a transaction is subject to the federal antitrust laws does not preclude the application of Texas antitrust laws⁷³ and vice versa.⁷⁴ The question then becomes, to what extent will Texas antitrust laws apply to intrastate transactions that also affect interstate

Co. v. International Harvester Co., 577 F.2d 239, 244 (5th Cir. 1977). Additionally, in the new statute the Texas Legislature chose to stress the accepted law that uniform prices alone do not establish an illegal conspiracy. Antitrust Act § 1 (to be codified at TEX. BUS. & COM. CODE ANN. § 15.05(h)).

64. *Gates v. Hooper*, 90 Tex. 563, 565, 39 S.W. 1079, 1080 (1897); *Comer v. Burton-Lingo Co.*, 58 S.W. 969, 970 (Tex. Civ. App. 1900, no writ) (combination found to exist because sale to more than one person).

65. See *Stewart v. Davis*, 417 S.W.2d 595, 597 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.); *Green v. Temple-Stuart Co.*, 408 S.W.2d 744, 745-46 (Tex. Civ. App.—Fort Worth 1966, no writ); *Padgett v. Lone Star Gas Co.*, 213 S.W.2d 133, 136 (Tex. Civ. App.—Dallas 1948, no writ); *Cunningham v. Frito Co.*, 198 S.W.2d 772, 775 (Tex. Civ. App.—San Antonio 1946, no writ); *McConnon & Co. v. Ralston*, 275 S.W. 165, 166 (Tex. Civ. App.—Texarkana 1925, no writ).

66. See *Weatherford Oil Tool Co. v. Campbell*, 161 Tex. 310, 312-13, 340 S.W.2d 950, 951 (1960).

67. *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 205-06 (5th Cir. 1969).

68. *Falls Rubber Co. v. La Fon*, 256 S.W. 577, 578-79 (Tex. Comm'n App. 1923, judgment adopted); *Welch v. Phelps & Bigelow Windmill Co.*, 89 Tex. 653, 655-56, 36 S.W. 71, 71-72 (1896); *Barr v. Southwest Wholesale Furniture & Appliance Co.*, 331 S.W.2d 343, 346 (Tex. Civ. App.—Fort Worth 1960, no writ); *Lemmon v. Furst & Thomas*, 166 S.W.2d 755, 756-57 (Tex. Civ. App.—Dallas 1942, writ ref'd w.o.m.).

69. *Hillsdale Gravel Co. v. Locke*, 67 S.W.2d 458, 459 (Tex. Civ. App.—Eastland 1933, no writ).

70. *Wickard v. Filburn*, 317 U.S. 111, 124-25 (1942).

71. See *Burke v. Ford*, 389 U.S. 320, 321 (1967); 15 U.S.C. § 45 (1976 & Supp. V 1981).

72. See *United States v. American Bldg. Maintenance Indus.*, 422 U.S. 271, 276 (1975); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974).

73. *State v. Southeast Tex. Chapter of Nat'l Elec. Contractors Ass'n*, 358 S.W.2d 711, 714 (Tex. Civ. App.—Texarkana 1962, writ ref'd n.r.e.), cert. denied, 372 U.S. 369 (1963). But see *Matuszak v. Houston Oilers, Inc.*, 515 S.W.2d 725, 728 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ) (federal preemption of sports permitted negative covenant of employment under *Flood v. Kuhn*, 407 U.S. 258 (1972)).

74. The field of insurance is an exception to this rule. See *Meicler v. Aetna Casualty & Sur. Co.*, 506 F.2d 732, 734 (5th Cir. 1975) (Texas antitrust regulation of insurance industry may in some instances preclude application of Sherman Act pursuant to McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1976)); see also *Royal Drug Co. v. Group Life & Health Ins. Co.*, 415 F. Supp. 343, 348 (W.D. Tex. 1976) (under McCarran-Ferguson Act federal antitrust laws inapplicable to insurance business when regulated by state law); Sanborn v.

commerce?⁷⁵

Early Texas courts had some difficulty in determining when the presence of intrastate commerce allowed application of the Texas antitrust laws.⁷⁶ Later, however, the Texas courts moved to a practical approach that considers the interests the state wishes to protect. When a court determines that a product has entered the common mass of property in Texas and that the restriction placed upon that product relates to its use in Texas, the transaction will be subject to the Texas antitrust laws.⁷⁷ In *Segal v. McCall Co.*⁷⁸ the Texas Supreme Court considered a contract in which a Texas vendee agreed to resell at prices set by its New York vendor and to sell only the vendor's products. On the issue of whether the Texas antitrust laws could apply to this arrangement, in spite of its clear interstate character, the Texas Supreme Court wrote:

[T]he provisions of the contract which are obnoxious to the Texas Anti-trust Act constitute no part of interstate commerce. They apply to acts to be performed by the vendee after the interstate commerce involved in the transaction has been completed. For a citizen of New York to sell and transport to a citizen of Texas goods and merchandise is to engage in interstate commerce; but when the sale and transportation has been completed, and the property has been delivered in Texas to a citizen of Texas, the interstate transaction has ended. The use to which the property may then be put in Texas, and the acts of the vendee in relation to it while in Texas, come under the jurisdiction of the Texas laws.⁷⁹

Palm, 336 F. Supp. 222, 228 (S.D. Tex. 1971) (no federal jurisdiction if agreement between insurance agents governed by Texas antitrust statutes).

The Texas Legislature recognized this fact by providing in the new statute that: "No suit under this Act shall be barred on the grounds that the activity or conduct complained of in any way affects or involves interstate or foreign commerce." Antitrust Act § 3 (to be codified at TEX. BUS. & COM. CODE ANN. § 15.25(b)); see *Woods Exploration & Prod. Co. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1302 (5th Cir. 1971).

75. Unquestionably, if a transaction is solely interstate, Texas antitrust law is inapplicable. See *Albertype Co. v. Gust Feist Co.*, 102 Tex. 219, 222, 114 S.W. 791, 792 (1908); *Green v. Temple-Stuart Co.*, 408 S.W.2d 744, 746 (Tex. Civ. App.—Fort Worth 1966, no writ).

76. See *Albertype Co. v. Gust Feist Co.*, 102 Tex. 219, 222, 114 S.W. 791, 792 (1908) (agreement of New York vendor not to sell to any other Galveston vendee); *Bogota Mercantile Co. v. Outcast Advertising Co.*, 184 S.W. 333, 334 (Tex. Civ. App.—Texarkana 1916, no writ); *Dr. Koch Vegetable Tea Co. v. Malone*, 163 S.W. 662, 663 (Tex. Civ. App.—Dallas 1914, no writ); *State v. Racine Sattley Co.*, 134 S.W. 400, 403 (Tex. Civ. App. 1911, no writ); *Moroney Hardware Co. v. Goodwin Pottery Co.*, 120 S.W. 1088, 1091 (Tex. Civ. App. 1909, no writ); *Eclipse Paint & Mfg. Co. v. New Process Roofing & Supply Co.*, 120 S.W. 532, 534 (Tex. Civ. App. 1909, no writ); *Waters-Pierce Oil Co. v. White*, 106 S.W. 918, 920 (Tex. Civ. App. 1907, writ ref'd), *aff'd*, 212 U.S. 86 (1909).

77. See *W.T. Rawleigh Co. v. Land*, 115 Tex. 319, 328-29, 279 S.W. 810, 813 (1926); *Segal v. McCall Co.*, 108 Tex. 55, 59-60, 184 S.W. 188, 190 (1916); *McConnon & Co. v. Marshall*, 280 S.W. 323, 324 (Tex. Civ. App.—Texarkana 1926, no writ); *J.R. Watkins Medical Co. v. Johnson*, 162 S.W. 394, 397 (Tex. Civ. App.—San Antonio 1913, writ ref'd).

78. 108 Tex. 55, 184 S.W. 188 (1916).

79. *Id.* at 59-60, 184 S.W. at 189-90; see *Kissel Motor Car Co. v. Walker*, 270 F. 492, 496 (5th Cir. 1921) (contract between auto manufacturer and Texas dealer held invalid because provision for resale violated Texas antitrust laws); *Pram Laboratories, Inc. v. Pram Laboratories-South*, 445 S.W.2d 533, 536 (Tex. Civ. App.—Dallas 1969, no writ) (title passed from Pennsylvania seller to Texas buyer; therefore, restraint on buyer was illegal); *Green v. Temple-Stuart Co.*, 408 S.W.2d 744, 746-47 (Tex. Civ. App.—Fort Worth 1966, no

The fact that the amount of intrastate commerce involved in a transaction is insignificant when compared to the amount of interstate commerce apparently provides no shelter from the Texas antitrust laws.⁸⁰ In *M.I.I. v. E.F.I., Inc.*⁸¹ the court concluded that it had jurisdiction over the matter even though ninety percent of the affected sales were outside Texas and stated that "simply because interstate commerce may be affected, the courts of Texas are not prohibited from giving effect to its antitrust laws."⁸² Thus, Texas antitrust laws may have application and effect well beyond the borders of Texas.⁸³

writ) (Massachusetts seller shipped to Texas agent, who then shipped to buyers without breaking the original package; therefore, no intrastate commerce or sale involved); *Sloan v. Miami Margarine Co.*, 247 S.W.2d 169, 171-72 (Tex. Civ. App.—Dallas 1952, writ ref'd n.r.e.) (restraint only on out-of-state seller; therefore, Texas law did not apply); *Burpee Can Sealer Co. v. Henry McDonald Co.*, 75 S.W.2d 458, 460 (Tex. Civ. App.—El Paso 1934, writ ref'd) (once sale in interstate commerce completed, contract provision dealing with exclusive rights to resell product in Texas came under Texas antitrust laws and held void); see also *W.T. Rawleigh Co. v. Harper*, 17 S.W.2d 455, 456 (Tex. Comm'n App. 1929, judgment adopted) (where contract involves interstate purchase of goods, but as condition precedent requires agreement that would violate Texas antitrust statute once goods part of mass of goods in Texas, entire contract is void); *Henderson Tire & Rubber Co. v. Roberts*, 12 S.W.2d 154, 155 (Tex. Comm'n App. 1929, judgment adopted) (agreement providing for sale of tires by foreign corporation to Texas dealer that contained resale provisions violating Texas antitrust laws held void); *Jackson Brewing Co. v. Clarke*, 375 S.W.2d 352, 354 (Tex. Civ. App.—Beaumont 1964, no writ) (agreement between foreign corporation and Texas dealer to provide beer in Texas contained resale provisions violative of Texas antitrust laws and held void); *F.W. Cook Co. v. Page*, 294 S.W. 934, 935 (Tex. Civ. App.—San Antonio 1927, no writ) (contract between beer producer and in-state dealer violated Texas antitrust laws); *State v. Willys-Overland*, 211 S.W. 609, 614 (Tex. Civ. App.—San Antonio 1919, writ ref'd) (contract between auto manufacturer and in-state agents held violative of state antitrust laws); *Armstrong v. W.T. Rawleigh Medical Co.*, 178 S.W. 582, 584 (Tex. Civ. App.—Fort Worth 1915, writ dismissed) (contract between Illinois corporation and Texas medical company governing resale of products in Texas violated Texas antitrust statute); *J.R. Watkins Medical Co. v. Johnson*, 162 S.W. 394, 397 (Tex. Civ. App.—San Antonio 1913, writ ref'd) (contract calling for interstate sale of goods, but with provisions governing in-state resale that violated Texas antitrust laws, held void).

80. See *M.I.I. v. E.F.I., Inc.*, 550 S.W.2d 401, 404 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.), cert. denied, 435 U.S. 1008 (1978); *State v. Southeast Texas Chapter of Nat'l Elec. Contractor's Ass'n*, 358 S.W.2d 711, 713 (Tex. Civ. App.—Texarkana 1962, writ ref'd n.r.e.), cert. denied, 372 U.S. 965 (1963).

81. 550 S.W.2d 401 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.), cert. denied, 435 U.S. 1008 (1978).

82. *Id.* at 404; see also *State v. Southeast Texas Chapter of Nat'l Elec. Contractor's Ass'n*, 358 S.W.2d 711, 714 (Tex. Civ. App.—Texarkana 1962, writ ref'd n.r.e.) (state civil action brought before federal criminal indictment of same defendants, but defendants argued preemption because 75-90% of price-fixed equipment manufactured outside of Texas; court held: "The state protection of its own commerce against conspiracies in restraint of trade which also violate interstate commerce, is supplementary to the Federal regulatory scheme."), cert. denied, 372 U.S. 965 (1963); cf. *Cherokee Laboratories, Inc. v. Rotary Drilling Servs.*, 383 F.2d 97, 107 (5th Cir. 1967) (principal customers, a defendant, commission of tort in part, and effect in Texas not enough to warrant application of Texas antitrust laws: "Any restraint on the marketing of the product was imposed in interstate commerce and not after the product had been put into intrastate commerce."), cert. denied, 390 U.S. 904 (1968); *Denison Mattress Factory v. Spring-Air Co.*, 308 F.2d 403, 413 (5th Cir. 1962) (defendant's activities in Texas were only occasional and isolated; contract was interstate as to execution and performance); *Hughes Bros. Mfg. v. Cicero State Trust & Sav. Bank*, 24 F.2d 199, 200 (5th Cir. 1928) (transaction completed before further activities incident to it, which might be considered intrastate in character, were conducted).

83. *Waters-Pierce Oil Co. v. State*, 106 S.W. 918, 930 (Tex. Civ. App. 1908, writ ref'd)

C. Limits Imposed by Restrictive Statutory Language

The Texas antitrust statutes require more than a mere combination for the purpose of doing a prohibited act in intrastate commerce. The combination must restrict or affect something. The new statute requires an effect upon "trade or commerce."⁸⁴ The old statute, however, is not so clear as to precisely what must be affected.⁸⁵

The old statute required analysis and application of terms that lacked statutory definitions.⁸⁶ For example, most of the former statutory prohibitions require a "sale" of "tangible personal property."⁸⁷ Other provisions require a transaction involving "trade," "commerce," "aids to commerce," or "business."⁸⁸ These terms will be discussed and then contrasted to the language of the new statute. When considering the language of the old statute and the construction given that language by the courts, one must remember that no rule of reason was available to temper a conclusion that the statute applied in a given situation. This fact pervades each area of consideration under the old statute and must be kept in mind when considering whether a particular Texas decision under the old statute should be applied under the new statute. Whereas the courts construed the old statute narrowly as to scope and applicability because they lacked a rule of reason, the new statute should be applied broadly so that alleged restraints can be examined for reasonableness.

Trade, Commerce, and Free Pursuit of Lawful Business. Former section 15.02(b) provides that:

(b) A "trust" is a combination of capital, skill, or acts by two or more persons to

(1) restrict, or tend to restrict, trade, commerce, aids to commerce, . . . or the free pursuit of a lawful business; or

. . .

(3) prevent or lessen competition in

. . .

(C) . . . aids to commerce; or

(although restraints were nationwide, Texas law applicable because illegal restraints occurred in part in Texas), *aff'd*, 212 U.S. 86 (1909).

84. See Antitrust Act § 1 (to be codified at TEX. BUS. & COM. CODE ANN. § 15.05).

85. The definition of monopoly in former § 15.01 has no limiting language. TEX. BUS. & COM. CODE ANN. § 15.01 (Vernon 1968). Section 15.02(b)(7), defining a trust as a combination to "refrain from engaging in business," *id.* § 15.02(b)(7), and former § 15.03(c)(2) relating to "boycotts," *id.* § 15.03(c)(2), are also not limited. The failure to include limiting language in the latter two provisions could be used as a basis for greatly broadening the prohibitions against exclusivity, but no reported decisions have taken that approach.

86. As will become apparent, analytically the questions of whether "trade, commerce, aids to commerce," "tangible personal property," or "business" are involved are closely related. Equally related is the question of whether a "sale" has taken place. To conclude that an antitrust violation did or did not occur because a certain product was or was not involved is often equally as correct as to say a violation did or did not occur because a sale was or was not present. The discussions of these areas are separated because the overlap is not complete.

87. See, e.g., TEX. BUS. & COM. CODE ANN. § 15.02(b)(3)(A), (5)(A) (Vernon 1968).

88. *Id.* § 15.02(b).

(7) refrain from engaging in business⁸⁹

Read broadly, former section 15.02(b)(1) could have been construed as a restatement of section 1 of the Sherman Act⁹⁰ similar to that now found in section 15.05(a) of the new statute.⁹¹ Such a reading, however, would have rendered the remaining provisions of former section 15.02 meaningless. The meaning of the terms "trade," "commerce," "aids to commerce,"⁹² and "business" as used in the old statute is therefore problematical at best.⁹³ Those terms arguably apply only to merchandise, produce, and commodities.⁹⁴ In *Duggan Abstract Co. v. Moore*⁹⁵ the Fort Worth court of appeals stated: "[T]he 'Anti Trust' and 'Anti Monopoly' Statutes were passed to protect the general public in the manufacture, sale, distribution, etc., of merchandise, produce and commodities in which the public is interested."⁹⁶ In *State v. Fairbanks-Morse & Co.*⁹⁷ the Dallas court of appeals agreed with this evaluation and concluded that the business of construction of municipal light and power systems was not a commodity or article of commerce and, therefore, not within the definition of "trust."⁹⁸

Aids to Commerce. The easy conclusion that the repealed antitrust statute does not apply to transactions not involving articles of commerce is undercut by the decisions construing the "aids to commerce" language contained in former section 15.02(b). This caveat is important because the former

89. *Id.*

90. 15 U.S.C. § 1 (1976).

91. Antitrust Act § 1 (to be codified at TEX. BUS. & COM. CODE ANN. § 15.05(a)).

92. The term "aids to commerce" is closely related to the terms "trade, commerce" and "business"; however, because of the construction given the concept in early decisions, "aids to commerce" could theoretically be used to broaden greatly the scope of the repealed Texas antitrust statute. For this reason, the terms are discussed separately.

93. One concern is that an all-encompassing reading of the aids to commerce language could be judicially adopted. D. MOODY, TEXAS ANTITRUST LAWS AND THEIR ENFORCEMENT WITH SOME REFERENCE TO FEDERAL ANTITRUST LAWS 100, 107 (1953). A similar concern also exists with respect to the "free pursuit of a lawful business" language in TEX. BUS. & COM. CODE ANN. § 15.02(b)(1) (Vernon 1968). Unquestionably, the literal application of this language absent a rule of reason similar in scope to that applicable to the Sherman Act would paralyze Texas commerce. If such a construction was within the contemplation of the courts, it surely would have been advanced at some time since 1895, when the "aids to commerce" language first appeared in the statutes.

94. Two subsections of the former § 15.02 refer to "business." TEX. BUS. COM. & CODE ANN. § 15.02(b)(1) ("free pursuit of a business"), (b)(7) ("refrain from engaging in business"). The courts have discussed the first term, but not the latter.

95. 139 S.W.2d 198 (Tex. Civ. App.—Fort Worth 1940, writ dism'd judgmt cor.).

96. *Id.* at 201. The statute considered in *Duggan Abstract* included the aids to commerce, and, in fact, the plaintiff was relying upon the provision that refers to aids to commerce.

97. 246 S.W.2d 647 (Tex. Civ. App.—Dallas 1951, writ ref'd n.r.e.).

98. *Id.* at 654. In *Fairbanks-Morse* the state's allegations referred to the "free pursuit of the business of constructing municipal light and power systems." *Id.* (emphasis in original). Two other decisions—*State v. Missouri, K. & T. Ry.*, 99 Tex. 516, 91 S.W. 214 (1906); *Fort Worth & D.C. Ry. v. State*, 99 Tex. 34, 87 S.W. 336 (1905)—discuss free pursuit of business, but these cases, because they are also involved with Texas railroad statutes, have questionable precedential value. In *Graphilter Corp. v. Vinson*, 518 S.W.2d 952 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.), the court did not discuss free pursuit of business because a commodity was unquestionably involved.

statute broadly prohibits a trust that is "a combination . . . to . . . restrict, or tend to restrict . . . aids to commerce."⁹⁹ Theoretically, this language could easily encompass the restraints of commerce prohibited by section 1 of the Sherman Act.

In *Queen Insurance Co. v. State*¹⁰⁰ the Texas Supreme Court carefully analyzed the 1889 Texas antitrust statute and concluded that insurance, which is not always related to articles or commodities, was merely an "aid to commerce" and, therefore, not encompassed by the language of the antitrust statutes regarding "merchandise, produce or commodities."¹⁰¹ In 1895 the Texas Legislature amended the antitrust statute to include aids to commerce,¹⁰² and, in 1903, to include insurance.¹⁰³ Insurance was later held to be an aid to commerce within the provisions of the former Texas antitrust statute.¹⁰⁴ Aids to commerce were also discussed in *Forrest Photographic Co. v. Hutchinson Grocery Co.*¹⁰⁵ This decision illustrates the care with which the former Texas antitrust statute must be approached. Forrest Photographic sought to recover for certain tickets sold to Hutchinson Grocery for distribution to Hutchinson Grocery's customers. The tickets were redeemable for calendars. Hutchinson Grocery defended on the ground that the sales agreement upon which Forrest Photographic based its action was void and unenforceable under the Texas antitrust laws because the agreement restricted Forrest Photographic's right to sell tickets to other customers. The defense failed because the court held that no illegal "trust" was involved¹⁰⁶ and concluded that the remaining antitrust provisions relied upon by Hutchinson Grocery did not apply because they did not encompass "aids to commerce."¹⁰⁷ The court held that the tickets issued by Forrest Photographic were "a mere aid to defendant's business."¹⁰⁸

These decisions cause one to wonder whether the "aids to commerce" language of the former antitrust statute is not a readily available means to greatly expand the scope of the repealed Texas antitrust statute. Reading the statutes as always requiring a commodity would strip the aids to commerce provisions of all meaning, because under such an interpretation the prohibitions relating to aids to commerce would merely duplicate the prohibitions relating to "tangible personal property," discussed below. None of the courts considering aids to commerce took this approach. Sim-

99. TEX. BUS. & COM. CODE ANN. § 15.02(b) (Vernon 1968).

100. 86 Tex. 250, 24 S.W. 397 (1893).

101. *Id.* at 401. The 1889 statute did not mention aids to commerce.

102. Act of Apr. 30, 1895, ch. 83, § 1, 1895 Tex. Gen. Laws 112, 113, 10 H. GAMMEL, *supra* note 12, at 843.

103. Act of Mar. 31, 1903, ch. 94, § 1, 1903 Tex. Gen. Laws 118, 118.

104. *Griffin v. Palatine Ins. Co.*, 239 S.W. 637, 639 (Tex. Comm'n App. 1922, judgment adopted).

105. 108 S.W. 768 (Tex. Civ. App. 1908, no writ).

106. *Id.* at 769. The statutory prohibitions against trusts did prohibit restrictions with respect to aids to commerce. For reasons not pertinent to this discussion, the court concluded that the defendant failed to prove an illegal trust.

107. *Id.* at 769-70.

108. *Id.* at 770.

ilarly, construing aids to commerce as including only insurance would require the unsupportable assumption that the Texas Legislature in 1903 merely repeated itself when it amended the Texas antitrust statutes to cover insurance as well as aids to commerce. In light of the sparse and somewhat ancient authority construing the aids to commerce language, care should be taken in assuming that any transaction is free of the impact of the former Texas antitrust laws merely because merchandise, produce, or commodities are not involved.

Tangible Personal Property. The term "tangible personal property" appears so frequently in the repealed Texas antitrust laws¹⁰⁹ that if the primary product involved in a transaction is tangible personal property, one may be certain, unless no intrastate commerce or sale is involved, that the prohibitions found in the former antitrust statute will apply. The definition of tangible personal property is thus an important issue.

When analyzing a business practice challenged under the former Texas antitrust statute, Texas courts seek to identify the primary product involved in the transaction.¹¹⁰ The mere fact that tangible personal property is involved does not of itself invoke the repealed Texas antitrust statute. For example, in *Duggan Abstract Co. v. Moore*¹¹¹ the court concluded that the presence of an abstract of land title did not make the statute applicable. The court noted, "No person who owns [an abstract of title] can find a purchaser for it unless such person is interested in the land that it covers and in the title to the land."¹¹² Similarly, advertising, even when accompanied by tangible personal property, does not invoke the former antitrust statute.¹¹³ In both instances the primary product being sold was not tangible personal property. By contrast, the sale of stock has been labelled a commodity within the scope of the former Texas antitrust statute. The court in *Pound v. Lawrence*¹¹⁴ wrote:

A share of stock in a corporation, while itself not the tangible property of the corporation, yet it is a tangible thing, perceptible to the touch, a thing capable of being possessed and owned, and while incorporeal in its nature, it is personal property, a thing subject to barter and sale, mortgage and pledge, liable to attachment and execution like other

109. TEX. BUS. & COM. CODE ANN. §§ 15.02(b)(1)-(3)(A), 15.02(b)(3)(D)-(7), 15.03(a)(1), 15.03(a)(3), 15.03(b)(1) (Vernon 1968).

110. See *Vess v. Fred Astaire Dance Studios Corp.*, 229 F.2d 892, 894 (5th Cir. 1956) (license to operate dance studio, although accompanied by some tangible personal property, was not encompassed by Texas antitrust statutes); *Schow Bros., Inc. v. Adva-Talks Co.*, 232 S.W. 883, 884 (Tex. Civ. App.—Amarillo 1921, no writ) (advertising program with tangible personal property as part of program was not covered); *Forrest Photographic Co. v. Hutchinson Grocery Co.*, 108 S.W. 768, 770 (Tex. Civ. App. 1908, no writ) (contract for sale of tickets for calendars was contract for services and not covered).

111. 139 S.W.2d 198 (Tex. Civ. App.—Fort Worth 1940, writ dismissed judgment corrected).

112. *Id.* at 201.

113. *Schow Bros. v. Adva-Talks Co.*, 232 S.W. 883, 884 (Tex. Civ. App.—Amarillo 1921, no writ).

114. 233 S.W. 359 (Tex. Civ. App.—El Paso 1921, writ refused).

personal property, and a subject of conversion.¹¹⁵

The court apparently based this distinction on the value and transferability of the stock.¹¹⁶

The concept of tangible personal property is not unique to the former Texas antitrust statute. The definition and use of the term in the Texas general taxation statute accords with the construction of the term in an antitrust context. The tax statute defines "tangible personal property" as "personal property that can be seen, weighed, measured, felt, or touched or that is perceptible to the senses in any other manner."¹¹⁷ The focus in tax cases, as in antitrust litigation, is on the object of the transaction.¹¹⁸ Courts have not allowed collection of sales tax on sales of information on computer cards,¹¹⁹ computer software contained on magnetic tapes,¹²⁰ and statistical data, information, and reports presented in various forms.¹²¹

Sale. The former Texas antitrust statute places major emphasis on the requirement that covered transactions involve the marketing or sale of an item.¹²² The presence or absence of a sale carries important consequences. For example, if a mere consignment or agency is involved, the parties may fix prices, establish territories, or allocate customers, all of which would be illegal if a sale were involved.¹²³ If a party asserts that no sale occurred because he was an agent or a consignee, the Texas courts will closely examine the factual basis of the assertion.¹²⁴ Texas courts, however, appear less likely than federal courts to find an antitrust violation by disregarding

115. *Id.* at 316; *cf.* *Coca-Cola Co. v. State*, 225 S.W. 791, 793 (Tex. Civ. App.—Austin 1920, no writ) (patent was not "article of commerce").

116. *See* TEX. BUS. & COM. CODE ANN. § 8.101-.406 (Vernon 1968 & Supp. 1982-1983). Interestingly, *Pound v. Lawrence* involved a trust, and, although the court did not so hold, it is likely that the court could have construed stock to be an aid to commerce, as well as being a commodity.

117. TEX. TAX CODE ANN. § 151.009 (Vernon 1982).

118. *Bullock v. Statistical Tabulating Corp.*, 549 S.W.2d 166, 168 (Tex. 1977).

119. *Id.*

120. *First Nat'l Bank v. Bullock*, 584 S.W.2d 548, 550 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).

121. *Williams & Lee Scouting Serv. v. Calvert*, 452 S.W.2d 789, 792 (Tex. Civ. App.—Austin 1970, writ ref'd).

122. A Texas court has held that without a sale or purchase there is no antitrust violation. *Cunningham v. Frito Co.*, 198 S.W.2d 772, 775 (Tex. Civ. App.—San Antonio 1946, no writ). An employment or an agency contract does not involve a sale and is, therefore, not subject to statutes. *Gates v. Hooper*, 90 Tex. 563, 565, 39 S.W. 1079, 1080 (1897).

123. *Welch v. Phelps & Bigelow Windmill Co.*, 89 Tex. 653, 36 S.W. 71 (1896); *Sharp v. J.R. Watkins Co.*, 250 S.W.2d 739, 742 (Tex. Civ. App.—El Paso 1952, no writ); *Cunningham v. Frito Co.*, 198 S.W.2d 772, 775 (Tex. Civ. App.—San Antonio 1946, no writ); *Lemmon v. Furst & Thomas*, 166 S.W.2d 755, 757 (Tex. Civ. App.—Dallas 1942, writ ref'd w.o.m.); *Stein Double Cushion Tire Co. v. Wm. T. Fulton Co.*, 159 S.W. 1013, 1016 (Tex. Civ. App.—Dallas 1913, no writ).

124. Note that the issue of whether there was a sale is closely related to the issue of whether there is a combination. *Welch v. Phelps & Bigelow Windmill Co.*, 89 Tex. 653, 655, 36 S.W. 71, 72 (1896). A court can conclude there was no sale between an agent and principal, an employer and employee, or a parent and a subsidiary, or that there was no combination. *See supra* notes 63-69 and accompanying text. The combination analysis is usually the better approach.

the form of the transaction.¹²⁵

Questions as to the existence of a sale also arise outside the agency/consignment context. As noted previously, Texas courts will identify the product being sold, and if no sale of a product covered by the statutes has taken place, then no violation has occurred. For example, in *Llewellyn v. Borin*¹²⁶ a supplier granted a distributor an exclusive territory that would be unquestionably illegal under the Texas antitrust laws if a sale of a good were involved. After examining the nature of the transaction, the court concluded that no sale of goods had occurred. The court determined that the distributor sold advertising to his customers and that, as part of the transaction, the purchasers of the advertising were given the magazines that the distributor purchased from his supplier.¹²⁷ Therefore, the distributor's purchase of the magazines was not a sale as required by the Texas antitrust statutes.¹²⁸ The court could have concluded, as easily and as correctly, that the Texas antitrust statutes did not apply because the product involved was not an article of commerce. Similarly, the cases discussed above with respect to "trade, commerce, aids to commerce" and "tangible personal property" could have been analyzed as lacking a sale. In fact, to a large degree the analysis of what product is involved can be subsumed by the issue of whether a sale occurred, and vice versa. A transaction cannot be analyzed properly without examining both issues, however, because Texas courts do not always handle the issues consistently.¹²⁹

The Language of the New Texas Antitrust Statute. A tremendous amount of confusion arose under the old statute from attempts to construe terms such as trade, commerce, aids to commerce, sale, and tangible personal property. The new Texas antitrust statute attempts to simplify antitrust adjudication by limiting the use of such terms. The prohibitions found in section 15.05 of the new statute focus on three terms: "trade or commerce," "goods," and "services."¹³⁰ Only the prohibition in section 15.05(c) on agreements not to deal with the goods of others is limited in

125. See *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964). For a discussion of the consignment and sale issue in an antitrust context, see *Cole Motor Car Co. v. Hurst*, 228 F. 280, 283 (5th Cir. 1915); *Henderson Tire & Rubber Co. v. Roberts*, 12 S.W.2d 154, 155 (Tex. Comm'n App. 1929, judgment adopted); *American Brewing Ass'n v. Woods*, 215 S.W. 448, 450-51 (Tex. Comm'n App. 1919, judgment adopted); *Lemmon v. Furst & Thomas*, 166 S.W.2d 755, 757 (Tex. Civ. App.—Dallas 1942, writ ref'd w.o.m.); *J.R. Watkins Medical Co. v. Johnson*, 162 S.W. 394, 396 (Tex. Civ. App.—San Antonio 1913, writ ref'd); *Stein Double Cushion Tire Co. v. Wm. T. Fulton Co.*, 159 S.W. 1013, 1017 (Tex. Civ. App.—Dallas 1913, writ ref'd). Even though the seller kept title as security for the purchase price, the true transaction discovered by the court was a sale, not a consignment. *Morris v. J.I. Case Credit Corp.*, 411 S.W.2d 783, 789 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.); *National Automatic Mach. Co. v. Smith*, 32 S.W.2d 678, 680 (Tex. Civ. App.—Austin 1930, no writ).

126. 569 S.W.2d 946 (Tex. Civ. App.—Texarkana 1978, no writ).

127. *Id.* at 950.

128. *Id.* at 949-50.

129. Compare *Llewellyn v. Borin*, 569 S.W.2d 946, 949-50 (Tex. Civ. App.—Texarkana 1978, no writ) (court held no sale occurred); with *Schow Bros. v. Adva-Talks Co.*, 232 S.W. 883, 884 (Tex. Civ. App.—Amarillo 1921, no writ) (court held no product involved).

130. Antitrust Act § 1 (to be codified at TEX. BUS. & COM. CODE ANN. § 15.05).

that it requires a sale or lease, or a contract for the sale or lease, of goods.¹³¹ The remaining sections apply broadly to "trade or commerce." The question thus becomes whether use of the terms "trade or commerce" and "goods" ends the confusion found under the old statute. Before addressing this question, however, one should note that the new statute, although intended to be construed in harmony with federal law, departs from federal law by defining terms.¹³² The flexibility allowed the courts in construing federal antitrust laws is one of the great strengths of the federal statutes.¹³³ Any statutory definition perforce removes some of the flexibility the federal courts have enjoyed in applying the federal statutes. One must hope that the attempt to provide a degree of certainty in the new statute will not cause confusion similar to that occurring under the old statute.

Analysis of the new statute begins with the definitions themselves. Section 15.03(e) provides:

The terms "trade" and "commerce" mean the sale, purchase, lease, exchange, or distribution of any goods or services; the offering for sale, purchase, lease, or exchange of any goods or services; the advertising of any goods or services; and all other economic activity undertaken in whole or in part for the purpose of financial gain involving or relating to any goods or services.¹³⁴

This definition is clearly very broad and should leave few, if any, areas of Texas commerce unregulated. Perhaps the best way to examine the changes in the new statute is to analyze certain problems under the old statute. The difficulties involving insurance under the early Texas statutes have been resolved. The term "goods" explicitly includes insurance.¹³⁵ Similarly, the statute handles problems with tangible versus intangible personal property by defining the term "goods" to include "any property, tangible or intangible, real, personal, or mixed."¹³⁶ Advertising expressly falls within the definition of "trade" and "commerce."¹³⁷ Products such as computer software and other information contained on computer materials should also be included in the definition of "goods," since these items have value.¹³⁸ Some room for interpretation remains under section 15.05(c) in determining whether a transaction involves goods or services. The holding in *Duggan Abstract Co. v. Moore*¹³⁹ should answer the question of whether a title abstract constitutes goods or services for purposes of

131. *Id.* (to be codified at TEX. BUS. & COM. CODE ANN. § 15.05(c)).

132. "Commerce" is defined at 15 U.S.C. § 12 (1976), but that definition has not impacted upon the scope of the federal statutes. The old Texas statute did not unnecessarily define terms; it used terms that were vague and redundant.

133. A good example of the flexibility of the federal statutes is found in the overruling of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), in *Continental T.V. v. GTE Sylvania*, 433 U.S. 36 (1977).

134. Antitrust Act § 1 (to be codified at TEX. BUS. & COM. CODE ANN. § 15.03(e)).

135. *Id.* (to be codified at TEX. BUS. & COM. CODE ANN. § 15.03(b)).

136. *Id.*

137. *Id.* (to be codified at TEX. BUS. & COM. CODE ANN. § 15.03(e)).

138. *See id.* (to be codified at TEX. BUS. & COM. CODE ANN. § 15.03(b)).

139. 139 S.W.2d 198 (Tex. Civ. App.—Fort Worth 1940, writ dismissed judgment cor.).

section 15.05(c). Such an abstract has no value in and of itself, and therefore must be a service because its value lies in the service that it represents.¹⁴⁰ Similarly, the question of whether advertising, accompanied by tangible advertising products, is a good or service should be answered by reference to cases such as *Llewellyn v. Borin*.¹⁴¹

The new statute is not limited to "sales" as was the old statute. The term is used in the new statute but does not seem to limit the application of the statute. Only section 15.05(c), regulating tying arrangements, requires a sale of goods.¹⁴² Existing Texas and federal law appear to be in accord on how to determine whether a sale arrangement exists,¹⁴³ and the inclusion of the leases in section 15.05(c) serves to broaden the scope of the statute. The term "sale" is found in the definition of trade and commerce, but in that context use of the term does not limit the definition. Trade and commerce includes the "sale, purchase, lease, exchange or distribution of any goods or services."¹⁴⁴ Thus, use of the term "sale" does not limit the scope of the new statute except in the context of arrangements under section 15.05(c).

The new statute does contain a peculiarity not present in the old statute. As noted above, the new statute is broadly drafted and encompasses within its terms services rendered by professionals such as physicians, accountants, attorneys, engineers, and dentists. With respect to a narrow subcategory of professions, however, applicability of the statute is restricted by two factors that must be considered when evaluating the reasonableness of particular restraints. When examining the reasonableness of a non per se illegal restraint entered into by professionals, a court must consider "(1) whether the activities involved maintain or improve the quality of such services to benefit the public interest, (2) whether the activities involved limit or reduce the cost of such services to benefit the public interest."¹⁴⁵ This provision of the new statute covers only those services rendered by accountants, physicians, and professional engineers.¹⁴⁶

III. BUSINESS ACTIVITY UNDER THE ANTITRUST LAWS

With the exception of covenants not to compete,¹⁴⁷ the remainder of this discussion assumes that for purposes of the former statute a manufacturer

140. *Id.* at 201.

141. 569 S.W.2d 946 (Tex. Civ. App.—Texarkana 1978, no writ).

142. Antitrust Act § 1 (to be codified at TEX. BUS. & COM. CODE ANN. § 15.05(c)).

143. *See supra* note 125 and accompanying text.

144. Antitrust Act § 1 (to be codified at TEX. BUS. & COM. CODE ANN. § 15.03(e)).

145. *Id.* (to be codified at TEX. BUS. & COM. CODE ANN. § 15.05(i)).

146. *Id.*

147. Restrictive covenants have been reviewed in an antitrust law context, but have not usually been examined under the antitrust statutes. *See Weatherford Oil Tool Co. v. Campbell*, 161 Tex. 310, 312, 340 S.W.2d 950, 951 (1960). Courts considering this area have not expressed the same concern with issues such as interstate/intrastate commerce and the presence of a sale that they have when considering other activities. *See Cawse-Morgan v. Murray*, 633 S.W.2d 348, 350 (Tex. Civ. App.—Corpus Christi 1982, no writ) (employment agency); *AMF Turboscope v. McBryde*, 618 S.W.2d 105, 108 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.) (inspection testing of oilfield pipes).

or supplier is selling tangible personal property to persons who will use or resell the product in Texas. This discussion also assumes an effect on trade or commerce under the new statute. These assumptions will serve to focus attention on specific activities; however, one must remember that the scope of the repealed antitrust statute frequently determines the legality of a particular activity. As noted previously, the legality or illegality of horizontal activity under either federal law, the repealed Texas statute, or the new Texas statute does not vary in a substantive sense.¹⁴⁸ Rather, the variations between the repealed statute and the new statute become most evident in the area of vertical restraints.

The new Texas statute prohibits certain conspiracies in restraint of trade or commerce: monopolies, attempts to monopolize, and conspiracies to monopolize; agreements not to use the goods of competitors; and mergers and acquisitions. These prohibitions track the comparable federal statutes. A detailed review of all the provisions of the federal antitrust statutes adopted by the Texas Legislature and contained in the new statute is beyond the scope of this Article. A brief review of the federal statutes is appropriate, however,¹⁴⁹ and begins with section 1 of the Sherman Act, the bulwark of federal antitrust law. Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce."¹⁵⁰ Read literally, section one of the Sherman Act would bring trade and commerce to a standstill. The United States Supreme Court has concluded instead that only "unreasonable" restraints are prohibited.¹⁵¹ Courts may use one of two approaches to determine whether a particular transaction imposes an unreasonable restraint. First, a restraint may be of such a pernicious nature that its mere existence is per se illegal.¹⁵² Second, a restraint may be shown to be unreasonable. This determination involves the use of what is known as the rule of reason.¹⁵³ Since the United States Supreme Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*,¹⁵⁴ the courts have demonstrated a

148. See *supra* note 11.

149. Countless articles and books have been written on the subject of the federal antitrust statutes and their meaning. Two publications are particularly helpful in analyzing a transaction for its antitrust ramifications. The first is J. VON KALINOWSKI, *supra* note 37 (16 volumes). The second publication is the Practising Law Institute's Course Handbook, Number 416, on the Twenty Fourth Annual Antitrust Law Institute. The review of federal antitrust law in this Article is limited and somewhat simplistic. The approach used in this Article to determine which antitrust statutes are arguably applicable, to examine the scope of the specific statute, and finally to evaluate the application of the statutes in terms of previously prohibited types of behavior is as valid under federal antitrust law and the new Texas antitrust statute as it was under the former Texas statute.

150. 15 U.S.C. § 1 (1976).

151. *Standard Oil Co. v. United States*, 221 U.S. 1, 51 (1911). The contract, combination, and conspiracy issue has been discussed previously, and for purposes of this discussion a combination is assumed to exist.

152. See *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

153. See *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 693-95 (1978); *Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

154. 433 U.S. 36 (1977).

greater willingness to examine transactions, including those that traditionally have been viewed as per se illegal, under the rule of reason.

Courts have held horizontal restraints, that is, agreements among competitors to fix prices,¹⁵⁵ divide territories, markets, or customers,¹⁵⁶ or to boycott,¹⁵⁷ per se illegal under section 1 of the Sherman Act. Vertical price fixing¹⁵⁸ and tying arrangements¹⁵⁹ are also per se illegal. Other vertical arrangements require analysis beyond a mere finding of proscribed conduct. These include agreements with respect to territories, market, or customers,¹⁶⁰ exclusive dealing arrangements,¹⁶¹ and boycotts.¹⁶² The broad scope of section 1 of the Sherman Act subsumes violations of section 3 of the Clayton Act. The different applications of the two statutes, however, can become important.¹⁶³

Section 2 of the Sherman Act encompasses monopolization, attempts to monopolize, and conspiracies to monopolize.¹⁶⁴ Basically, the offense involves a determination of markets and of market power,¹⁶⁵ which can become extremely complex.¹⁶⁶ Once the relevant market is defined, the use of the monopoly¹⁶⁷ or the efforts to attain the monopoly power and the

155. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940). *But see* *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 23-24 (1979).

156. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610-13 (1972); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 597-98 (1951).

157. *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959). *But see* *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980).

158. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102-03 (1980); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

159. *See* *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5-6 (1958). The determination of whether a tying arrangement exists can be much more complex than the analysis needed to find other per se illegal conduct. *See* *United States Steel Corp. v. Fortner Enters.*, 429 U.S. 610 (1977); *International Salt Co. v. United States*, 332 U.S. 392 (1947).

160. *See* *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

161. *See* *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); *Standard Oil Co. v. United States*, 337 U.S. 293 (1949).

162. *See* *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *Blackburn v. Crum & Forster*, 611 F.2d 102 (5th Cir.), *cert. denied*, 447 U.S. 906 (1980).

163. Under both statutes tying arrangements are illegal while other similar arrangements are reviewed under the rule of reason. *See* *Foremost Pro Color v. Eastman Kodak Co.*, 703 F.2d 534, 540-41 (9th Cir. 1983); *Hyde v. Jefferson Parish Hosp. Dist.*, 686 F.2d 286, 289 (5th Cir. 1982), *cert. granted*, 103 S. Ct. 1271 (1983).

No Texas antitrust cases analyze tying arrangements. *See* *Sanborn v. Palm*, 336 F. Supp. 222, 228 (1972). A detailed discussion of tying arrangements is beyond the scope of this Article; the basic concept, however, is relatively simple. The United States Supreme Court has held that "the common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity, with the desired purchase of a dominant 'tying' product, resulting in economic harm to competition in the 'tied' market." *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 614 (1953). The application of § 1 of the Sherman Act, § 3 of the Clayton Act, and § 15.05(a) and (c) of the new Texas statute to putative tying arrangements can become quite complicated. *See* 16B J. VON KALINOWSKI, *supra* note 37, §§ 12.01-14.04.

164. 15 U.S.C. § 14 (1976).

165. *See* *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

166. *See* *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956).

167. *See* *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

likelihood of success¹⁶⁸ become the important issues.

The repealed Texas antitrust statute declares illegal "[e]very monopoly, trust, and conspiracy in restraint of trade."¹⁶⁹ Basically, "monopolies" relate to aggregations of corporations,¹⁷⁰ "trusts" or agreements that have the effect of lessening competition,¹⁷¹ and "conspiracies" to agreements that preclude the parties thereto from doing business with others.¹⁷² The statutes are specific in their prohibitions, but a fair degree of overlap exists, so that when examining an activity for legality under the Texas statutes one must take care to consider all applicable provisions.

This discussion of vertical restraints begins with consideration of the rule of reason and focuses primarily on vertical price fixing and exclusive vertical arrangements. Both types of agreements are suspect under the old and new antitrust statutes.¹⁷³ Another vertical activity, price discrimination, which is prohibited only by the criminal provisions of the former antitrust statute, is also considered.

A. Application of a Rule of Reason

Possibly the most significant change brought about by the new statute is the recognition of a rule of reason under Texas antitrust law. The statute does not explicitly adopt a rule of reason, but that result is certainly implicit in the mandate that the statute be construed in harmony with federal antitrust law and in the mention of reasonableness with respect to professionals. As explored below, this change alone revolutionizes Texas antitrust law.

Texas courts have long held that no rule of reason applies to save an activity that falls under the prohibitions of the old antitrust statute.¹⁷⁴ Us-

168. See *Swift & Co. v. United States*, 196 U.S. 375, 396-98 (1905).

169. TEX. BUS. & COM. CODE ANN. § 15.04(a) (Vernon 1968).

170. *Id.* § 15.01. A "monopoly" is

a combination or consolidation of two or more corporations effected by . . . bringing the direction of their affairs under common management or control to create, or where the common management or control tends to create, a trust as defined in Section 15.02 of this code; or . . . one corporation acquiring (in whole or in part . . .) the stock, bonds, franchise or other rights, or physical property of one or more other corporations to prevent or lessen, or where the acquisition tends to prevent or lessen, competition.

Id.

171. *Id.* § 15.02. A "trust" is "a combination of capital, skill, or acts by two or more persons to" engage in certain specified behavior relating to trade, commerce, aids to commerce, business, and tangible personal property. *Id.*

172. *Id.* § 15.03. A "conspiracy" is an agreement by two or more persons to engage in certain types of listed behavior. *Id.*

173. Provisions potentially applicable to vertical price fixing include Antitrust Act § 1 (to be codified at TEX. BUS. & COM. CODE ANN. § 15.05(a)); TEX. BUS. & COM. CODE ANN. §§ 15.01, 15.02(b)(1)-(5) (Vernon 1968). Provisions potentially applicable to exclusive arrangements include Antitrust Act § 1 (to be codified at TEX. BUS. & COM. CODE ANN. § 15.05(c)); TEX. BUS. & COM. CODE ANN. §§ 15.01, 15.02(b)(1), 15.02(3), 15.02(5)(C), 15.02(7), 15.03 (Vernon 1968).

174. *Climatic Air Distribs. v. Climatic Air Sales, Inc.*, 162 Tex. 237, 241, 345 S.W.2d 702, 704 (1961); *Texas & Pac. Coal Co. v. Lawson*, 89 Tex. 394, 400, 34 S.W. 919, 920 (1896). Reasonableness was an issue in an antitrust case involving activities occurring before the

ing federal antitrust terminology, behavior prohibited by the former Texas antitrust statute is *per se* illegal. The Texas Supreme Court made this position clear in 1895 in *Anheuser Busch Brewing Association v. Houch*.¹⁷⁵ The Texas Supreme Court held that "[t]he act denounces combinations in restraint of trade, and makes no distinctions between restrictions which are reasonable and those which are unreasonable."¹⁷⁶ Although no rule of reason is applicable to the former Texas antitrust statute, one must note, nevertheless, that courts on occasion have moderated the *per se* rule with considerations of reasonableness, particularly with respect to vertical distribution arrangements.¹⁷⁷ The use of reasonableness under the former statute is tacit and appears in the application of labels and exceptions. For example, exclusive arrangements that are judged by reasonableness include requirements and output contracts¹⁷⁸ and location clauses.¹⁷⁹ Other exclusive arrangements fall under exceptions such as leases¹⁸⁰ and patents.¹⁸¹ In this area of exclusivity form has been elevated over substance to avoid the Draconian effect of the Texas courts' rejection of a rule of reason.

B. Particular Vertical Behavior

1. Vertical Price Fixing.

Although the federal courts have become more tolerant of certain vertical restraints, vertical price fixing remains *per se* illegal under federal

passage of the Texas antitrust statute in 1889. *Texas Standard Cotton Oil Co. v. Adoue*, 83 Tex. 650, 659, 19 S.W. 274, 277 (1892). Reasonableness was also mentioned in a dictum in an early statutory case. *Queen Ins. Co. v. State*, 86 Tex. 250, 263, 24 S.W. 397, 400 (1893). 175. 88 Tex. 184, 30 S.W. 869 (1895).

176. *Id.* at 190, 30 S.W. at 870; *see also* *American Brewing Ass'n v. Woods*, 215 S.W. 448, 450 (Tex. Comm'n App. 1919, judgment adopted) (transaction within literal language of statute); *Graphilter Corp. v. Vinson*, 518 S.W.2d 952, 954 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.) (no question arises as to reasonableness); *Grand Prize Distrib. Co. v. Gulf Brewing Co.*, 267 S.W.2d 906, 907 (Tex. Civ. App.—San Antonio 1954, writ ref'd) (strict language of statute). The court in *State v. Fairbanks-Morse & Co.*, 246 S.W.2d 647 (Tex. Civ. App.—Dallas 1952, writ ref'd n.r.e.), apparently disagreed with clear holdings of the Texas Supreme Court and wrote "it has been almost universally held that contracts and combinations which tend to promote business, and which only remotely, incidentally, and indirectly restrain competition, are not forbidden." *Id.* at 659; *see also* *Lawler v. Aramco, Inc.*, 447 S.W.2d 189, 193 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.) (illegal absent "dominant social or economic justification" and if not limited in geographical area or time).

177. Reasonableness is an accepted issue in covenant not to compete cases, with respect to both the issue of damages and injunctive relief, where the covenant not to compete is ancillary to another contract. *See Frankiewicz v. National Comp Assocs.*, 633 S.W.2d 505, 507 (Tex. 1982); *Justin Belt Co., v. Yost*, 502 S.W.2d 681, 685 (Tex. 1973); *Weatherford Oil Tool Co. v. Campbell*, 161 Tex. 310, 312-14, 340 S.W.2d 950, 951-54 (1960).

178. *See Portland Gasoline Co. v. Superior Mktg. Co.*, 150 Tex. 533, 535, 243 S.W.2d 823, 823-24 (Tex. 1951); *Cox, Inc. v. Humble Oil & Ref. Co.*, 16 S.W.2d 285, 287 (Tex. Comm'n App. 1929, judgment adopted).

179. *Ford Motor Co. v. State*, 142 Tex. 5, 15, 175 S.W.2d 230, 237 (1943).

180. *See City Prods. Corp. v. Berman*, 610 S.W.2d 446, 448 (Tex. 1980); *Schnitzer v. Southwest Shoe Corp.*, 364 S.W.2d 373, 374 (Tex. 1963).

181. *See Coca-Cola Co. v. State*, 225 S.W. 791, 793 (Tex. Civ. App.—Austin 1920, no writ).

law.¹⁸² State courts should reach the same conclusion under the new Texas statute. Similarly, under the repealed statute Texas courts had little difficulty declaring vertical price fixing illegal and invented no labels to legitimize the clearly pernicious nature of such agreements. The Texas Supreme Court held in *Ford Motor Co. v. State*¹⁸³ that "[i]t is a violation of our antitrust laws for one party to enter into a contract with another party, whereby it is agreed that goods or products sold by the one party to the other party for resale in this State shall be resold at fixed or agreed prices, or at prices to be fixed or determined by the original seller."¹⁸⁴ The fact that an agreement may lower prices, at least temporarily, will not save the agreement from illegality.¹⁸⁵

Suggested resale prices, as such, have not been found illegal under the Texas antitrust laws.¹⁸⁶ Depending on the factual circumstances of the case, adherence to suggested resale prices also may be legal; great care must be taken, however, to assure that no compulsion to adhere to the

182. See *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 103 (1980); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51 n.18 (1977).

183. 142 Tex. 5, 175 S.W.2d 230 (1943).

184. *Id.* at 9, 175 S.W.2d at 233; see *Segal v. McCall Co.*, 108 Tex. 55, 59, 184 S.W. 188, 189-90 (1916); *Jackson Brewing Co. v. Clarke*, 375 S.W.2d 352, 354 (Tex. Civ. App.—Beaumont 1964, writ ref'd n.r.e.); *Marathon Oil Co. v. Hadley*, 107 S.W.2d 883, 885 (Tex. Civ. App.—Fort Worth 1935, writ dismissed w.o.j.); *Dickerson v. McConnon & Co.*, 248 S.W. 1084, 1085 (Tex. Civ. App.—Beaumont 1923, no writ). The W.T. Rawleigh Co. did much to establish the rules in Texas antitrust jurisprudence that resale price fixing, grants of exclusive territory, and exclusive dealing are per se illegal under the former statute, and that no recovery is allowed under a void contract. See *W.T. Rawleigh Co. v. Land*, 115 Tex. 319, 279 S.W. 810 (1926); *W.T. Rawleigh Co. v. Harper*, 17 S.W.2d 455 (Tex. Comm'n App. 1929, judgment adopted); *Harcrow v. W.T. Rawleigh Co.*, 145 S.W.2d 925 (Tex. Civ. App.—Eastland 1940, no writ); *W.T. Rawleigh Co. v. Baker*, 117 S.W.2d 1117 (Tex. Civ. App.—Texarkana 1938, no writ); *Due v. W.T. Rawleigh Co.*, 58 S.W.2d 179 (Tex. Civ. App.—Beaumont 1933, no writ); *Chunn v. W.T. Rawleigh Co.*, 9 S.W.2d 268 (Tex. Civ. App.—Austin 1928, no writ); *W.T. Rawleigh Co. v. Gober*, 3 S.W.2d 845 (Tex. Civ. App.—Waco 1928, no writ); *W.T. Rawleigh Co. v. Bradberry*, 290 S.W. 870 (Tex. Civ. App.—Amarillo 1927, no writ); *W.T. Rawleigh Co. v. Fish*, 290 S.W. 798 (Tex. Civ. App.—Eastland 1927, writ dismissed); *W.T. Rawleigh Co. v. Hudson*, 290 S.W. 775 (Tex. Civ. App.—El Paso 1926, no writ); *W.T. Rawleigh Co. v. Fletcher*, 275 S.W. 210 (Tex. Civ. App.—Texarkana 1925, no writ); *W.T. Rawleigh Co. v. Land*, 261 S.W. 186 (Tex. Civ. App.—Texarkana 1924), *aff'd*, 115 Tex. 319, 279 S.W. 810 (1926); *W.T. Rawleigh Co. v. Marshall*, 248 S.W. 153 (Tex. Civ. App.—Austin 1922, no writ); *W.T. Rawleigh Co. v. Lemon*, 247 S.W. 683 (Tex. Civ. App.—Amarillo 1922, no writ); *W.T. Rawleigh Co. v. Smith*, 231 S.W. 799 (Tex. Civ. App.—El Paso 1921, no writ); *Dodd v. W.T. Rawleigh Co.*, 203 S.W. 131 (Tex. Civ. App.—El Paso 1918, no writ); *Newby v. W.T. Rawleigh Co.*, 194 S.W. 1173 (Tex. Civ. App.—El Paso 1917, no writ); *W.T. Rawleigh Medical Co. v. Mayberry*, 193 S.W. 199 (Tex. Civ. App.—Fort Worth 1917, no writ); *W.T. Rawleigh Medical Co. v. Gunn*, 186 S.W. 385 (Tex. Civ. App.—El Paso 1916, no writ); *W.T. Rawleigh Medical Co. v. Fitzpatrick*, 184 S.W. 549 (Tex. Civ. App.—Austin 1916, no writ); *Armstrong v. W.T. Rawleigh Medical Co.*, 178 S.W. 582 (Tex. Civ. App.—Fort Worth 1915, writ dismissed).

185. *Uvalde Rock Asphalt Co. v. Colglazier Constr. Co.*, 299 S.W. 710, 713 (Tex. Civ. App.—San Antonio 1927, writ ref'd) (unusual agreement in that seller and a buyer fixed prices paid by other buyers).

186. *Pram Laboratories, Inc. v. Pram Laboratories-South, Inc.*, 445 S.W.2d 533, 537 (Tex. Civ. App.—Dallas 1969, no writ) (buyer could, and did, alter terms established by price sheet); *W.T. Rawleigh Co. v. Fish*, 290 S.W. 798, 800 (Tex. Civ. App.—Eastland 1927, writ dismissed).

resale prices is placed on the purchaser.¹⁸⁷ Similarly, merely because a contract provides that the buyer will pay a price determined as a percentage of a retail list price put on the product by the seller does not mean that resale prices have been fixed.¹⁸⁸

2. *Exclusivity Under the Former Statute.*

The former Texas antitrust laws posed the greatest threat to manufacturers and suppliers in the area of exclusivity. Simply stated, if a manufacturer or supplier is willing to sell its products without dictating where or to whom the products may be resold or from whom the purchaser may also purchase, the former Texas antitrust law does not interfere. If a manufacturer or supplier objects to this lack of control over the marketing of its product or the identity of its customers, however, the Texas antitrust statutes may play an important role.¹⁸⁹ Federal laws and the new Texas statute do not take such a hostile view of exclusivity. To understand the difference between the new and old Texas statutes, one must first examine the restrictions under the repealed statute.

Although exclusive arrangements were frequently considered under the repealed statute, the Texas courts failed to provide any clear analytical framework for examining suspect behavior. The failure resulted in part from the fact that a logical analytical framework would require recognition that not all vertical restrictions on customers or territory are anticompetitive, thus revealing the need for a rule of reason in the context of vertical restraints. As noted previously, the applicability of a rule of reason under the former Texas antitrust statutes has been rejected by the

187. Compare *Harcrow v. W.T. Rawleigh Co.*, 145 S.W.2d 925, 927 (Tex. Civ. App.—Eastland 1940, no writ) (buyer sold product at prices on price list); *Chunn v. W.T. Rawleigh Co.*, 9 S.W.2d 268, 268-69 (Tex. Civ. App.—Austin 1928, no writ) (buyer agreed to terms in sales material); *W.T. Rawleigh Co. v. Fish*, 290 S.W. 798, 800 (Tex. Civ. App.—Eastland 1927, writ dismissed) (buyer required to be “bound”); *W.T. Rawleigh Co. v. Fletcher*, 275 S.W. 210, 210 (Tex. Civ. App.—Texarkana 1925, no writ) (buyer bound by suggested retail price list not violative of antitrust laws); with *Caddell v. J.R. Watkins Medical Co.*, 227 S.W. 226, 228 (Tex. Civ. App.—San Antonio 1921, no writ) (because of power over vendee, vendor could dictate prices and exclusive territory; therefore, contract was illegal); *Whisenant v. Shores-Mueller Co.*, 194 S.W. 1175, 1177 (Tex. Civ. App.—El Paso 1917, writ dismissed) (contracts did not fix resale prices, but sales literature was apparently more emphatic). Again, this issue can be addressed in terms of whether or not a “combination” exists. See *W.T. Rawleigh Co. v. Harper*, 17 S.W.2d 455, 456 (Tex. Comm’n App. 1929, judgment adopted). For federal law on this subject, see *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922).

188. *Nu-Enamel Paint Co. v. Davis*, 63 S.W.2d 861, 864 (Tex. Civ. App.—Fort Worth 1933, writ dismissed w.o.j.).

189. Note, however, that without a combination a manufacturer may sell to whom it pleases. See *Sherrard v. After Hours, Inc.*, 464 S.W.2d 87, 89 (Tex. 1971); *Portland Gasoline Co. v. Superior Mktg. Co.*, 150 Tex. 533, 541, 243 S.W.2d 823, 827 (1951); *Ford Motor Co. v. State*, 142 Tex. 5, 9, 175 S.W.2d 230, 233 (1943); *Sessions Co. v. W.A. Sheaffer Pen Co.*, 344 S.W.2d 180, 184 (Tex. Civ. App.—Dallas 1961, writ refused n.r.e.); *Robison v. Roberts*, 279 S.W.2d 484, 485 (Tex. Civ. App.—Texarkana 1955, writ refused); *Erickson v. Times Herald Printing Co.*, 271 S.W.2d 329, 332 (Tex. Civ. App.—Dallas 1954, writ refused n.r.e.); *Jax Beer Co. v. Palmer*, 150 S.W.2d 452, 453-54 (Tex. Civ. App.—Fort Worth 1941, no writ).

Texas Supreme Court.¹⁹⁰ As a result, Texas courts allowed their decisions to be governed by the labels placed on an arrangement rather than by an analysis of the economic substance and anticompetitive effect of that arrangement. In recognition of the importance of labels under the former statute, the remainder of this section is divided into a discussion of the common labels used in evaluating exclusive arrangements under the old statute. This discussion is followed by a brief discussion of the federal antitrust principles that presumably will govern the application of the new statute.

Exclusive Territory. In *United States v. Arnold Schwinn & Co.*¹⁹¹ the United States Supreme Court held that vertical territorial restraints were per se illegal under the Sherman Act.¹⁹² In 1977 the Supreme Court overturned its decision in *Schwinn* and applied rule of reason analysis to a vertical nonprice restraint.¹⁹³ Under the repealed Texas statute, however, Texas courts continued to hold that exclusive restrictions are per se illegal and unenforceable.¹⁹⁴ The former Texas rule is easily stated. The Texas Supreme Court held in *Climatic Air Distributors v. Climatic Air Sales, Inc.*¹⁹⁵ that:

[T]he granting and accepting of the exclusive right to sell a manufacturer's product within a given territory is made a violation of the anti-trust statutes; that the Legislature has fixed this policy for the State; that the Legislature has clearly provided that any agreements in violation of the statutes shall be void and unenforceable; and that it is the duty of the Court to enforce the statute as it is written.¹⁹⁶

The focus in most cases is upon the word "exclusive." Under the former

190. *Climatic Air Distribs. v. Climatic Air Sales, Inc.*, 162 Tex. 237, 241, 345 S.W.2d 702, 704 (1961).

191. 388 U.S. 365 (1967).

192. *Id.* at 377-78.

193. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58-59 (1977).

194. *Kissell Motor Car Co. v. Walker*, 270 F. 492, 494-95 (5th Cir. 1921), *cert. denied*, 257 U.S. 634 (1921); *Sherrard v. After Hours, Inc.*, 464 S.W.2d 87, 89 (Tex. 1971); *Climatic Air Distribs. v. Climatic Air Sales, Inc.*, 162 Tex. 237, 241, 345 S.W.2d 702, 704 (1961); *Ford Motor Co. v. State*, 142 Tex. 5, 9, 175 S.W.2d 230, 233 (1943); *American Brewing Ass'n v. Woods*, 215 S.W. 448, 450 (Tex. Comm'n App. 1919, holding approved); *M.I.I. v. E.F.I., Inc.*, 550 S.W.2d 401, 404 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.), *cert. denied*, 435 U.S. 1008 (1978); *O'Neil v. Mack Trucks, Inc.*, 533 S.W.2d 832, 835-36 (Tex. Civ. App.—El Paso 1975), *rev'd on other grounds*, 542 S.W.2d 112 (Tex. 1970); *Albin v. Isotron Corp.*, 421 S.W.2d 739, 743 (Tex. Civ. App.—Texarkana 1967, writ ref'd n.r.e.); *Jackson Brewing Co. v. Clarke*, 375 S.W.2d 352, 354 (Tex. Civ. App.—Beaumont 1962, writ ref'd n.r.e.); *Grand Prize Distrib. Co. v. Gulf Brewing Co.*, 267 S.W.2d 906, 908 (Tex. Civ. App.—San Antonio 1954, writ ref'd); *Kelly v. Bryson Pipeline & Ref. Co.*, 163 S.W.2d 413, 414 (Tex. Civ. App.—Fort Worth 1942, no writ). *But see Norton v. W.H. Thomas & Sons Co.*, 99 Tex. 578, 580, 91 S.W. 780, 781 (1906) (unusual circumstance under 1899 statute); *Crowley Mercantile Co. v. Brenard Mfg. Co.*, 287 S.W. 127, 128 (Tex. Civ. App.—Waco 1926, no writ); *Brenard Mfg. Co. v. Crowley Mercantile Co.*, 260 S.W. 246, 247 (Tex. Civ. App.—San Antonio 1924, no writ).

195. 162 Tex. 237, 345 S.W.2d 702 (1961).

196. *Id.* at 241, 345 S.W.2d at 704; *see Patrizi v. McAninch*, 153 Tex. 389, 393, 269 S.W.2d 343, 346 (1954); *Ford Motor Co. v. State*, 142 Tex. 5, 9, 175 S.W.2d 230, 233 (1943); *Grand Prize Distrib. Co. v. Gulf Brewing Co.*, 267 S.W.2d 906, 908 (Tex. Civ. App.—San Antonio 1954, writ ref'd).

statute, once the word "exclusive" is found in an agreement, the agreement has virtually no chance of being upheld.¹⁹⁷ An agreement may also be illegal even if it does not contain the word "exclusive." For example, an agreement that a buyer will be subject to charges for sales outside its territory may, as a practical matter, so restrict the buyer's territory as to be illegal.¹⁹⁸ As discussed below, however, Texas courts will go to great lengths to apply labels that will permit a finding of legality.

Exclusive Dealing. Exclusive dealerships have long been held illegal under the former Texas statute.¹⁹⁹ Agreements not to deal with others or not to compete are also illegal, absent an exception.²⁰⁰ The concept of exclusive dealing lacks practical legal significance because the agreements that fall under the exclusive dealing rubric can be analyzed under other antitrust concepts. The significance of the concept lies in the importance of labels in analyzing a factual situation; arrangements labelled as exclusive are per se illegal.

There are two types of exclusive dealing arrangements, both of which are illegal.²⁰¹ Under the first type of arrangement the seller will not sell a particular product to any other buyers.²⁰² The second type of agreement

197. An area of primary responsibility if not, in fact, a combination to grant an exclusive territory is legal. See *Sherrard v. After Hours, Inc.*, 464 S.W.2d 87, 89 (Tex. 1971); *Erickson v. Times Herald Printing Co.*, 271 S.W.2d 329, 332 (Tex. Civ. App.—Dallas 1954, writ ref'd n.r.e.).

198. *Mendelovitz v. Adolph Coors Co.*, 693 F.2d 570, 578 n.17 (5th Cir. 1982) ("The Texas courts have expressed some willingness to look behind the distributorship agreement and to explore the true nature of the relationship between manufacturer and distributor."); *Ford Motor Co. v. State*, 142 Tex. 5, 17, 175 S.W.2d 230, 237 (1943); *Morris v. J.I. Case Credit Corp.*, 411 S.W.2d 783, 787 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.); *State v. Willys-Overland, Inc.*, 211 S.W. 609, 614 (Tex. Civ. App.—San Antonio 1919, writ ref'd).

199. *Segal v. McCall Co.*, 108 Tex. 55, 59, 184 S.W. 188, 189-90 (1916); *Texas Brewing Co. v. Templeman*, 90 Tex. 277, 280-81, 38 S.W. 27, 28 (1896); *Fuqua v. Pabst Brewing Co.*, 90 Tex. 298, 301, 38 S.W. 29, 30-31 (1896); *Henderson Tire & Rubber Co. v. Roberts*, 12 S.W.2d 154, 155 (Tex. Comm'n App. 1929, judgment adopted); *Elray, Inc. v. Cathodic Protection Serv.*, 507 S.W.2d 570, 572-73 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ); *Lawler v. Aramco, Inc.*, 447 S.W.2d 189, 193 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.); *Pram Laboratories, Inc. v. Pram Laboratories-South, Inc.*, 445 S.W.2d 533, 536 (Tex. Civ. App.—Dallas 1953, writ ref'd n.r.e.); *Marathon Oil Co. v. Hadley*, 107 S.W.2d 883, 885 (Tex. Civ. App.—Fort Worth 1935, writ dismissed w.o.j.); *W.T. Rawleigh Medical Co. v. Fitzpatrick*, 184 S.W. 549, 550 (Tex. Civ. App.—Austin 1916, no writ); *Armstrong v. W.T. Rawleigh Medical Co.*, 178 S.W. 582, 584 (Tex. Civ. App.—Fort Worth 1915, writ dismissed); *State v. Racine Sattley Co.*, 134 S.W. 400, 403 (Tex. Civ. App. 1911, no writ). But see *Ford Motor Co. v. State*, 142 Tex. 5, 12-13, 175 S.W.2d 230, 237 (1943) (requirement to use only Ford parts was legal).

200. *Graphiliter Corp. v. Vinson*, 518 S.W.2d 952, 954 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.); *Elray, Inc. v. Cathodic Protection Serv.*, 507 S.W.2d 570, 572-73 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ); *Lawler v. Aramco, Inc.*, 447 S.W.2d 189, 193 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.).

201. *Patrizi v. McAninch*, 153 Tex. 389, 394-95, 269 S.W.2d 343, 346 (1954); *Fuqua v. Pabst Brewing Co.*, 90 Tex. 298, 301, 38 S.W. 29, 30-31 (1896).

202. *Patrizi v. McAninch*, 153 Tex. 389, 394-95, 269 S.W.2d 343, 346 (1954); *Albertype Co. v. Gust Feist Co.*, 102 Tex. 219, 222, 114 S.W. 791, 792 (1909); *M.I.I. v. E.F.I., Inc.*, 550 S.W.2d 401, 403-04 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.), cert. denied, 435 U.S. 1008 (1978).

provides that the purchaser will buy from no other seller.²⁰³ The first form of exclusive dealing can be viewed as the grant of an exclusive territory²⁰⁴ or as a boycott.²⁰⁵ For example, in *M.I.I. v. E.F.I., Inc.*,²⁰⁶ an agreement granting the buyer exclusive sales rights in the United States was determined to be an exclusive territory agreement in the State of Texas and thus illegal.²⁰⁷ The second form of agreement is significant because it represents the illegal end of the spectrum of requirements contracts.²⁰⁸

Boycotts. Another form of exclusive relationship prohibited by the former Texas antitrust statute is the boycott, an agreement not to do business with another.²⁰⁹ As a practical matter the prohibition of boycotts cannot be clearly distinguished from the prohibitions of exclusive territories and exclusive dealings. The court in *Llewellyn v. Borin*,²¹⁰ relying upon certain exclusive territory cases, correctly noted that "[t]he type of agreement condemned by [the antitrust statutes] is that whereby one party sells products to another party and they agree to prohibit or restrict the purchase or resale of those products by or to other parties, or limit such sales to a territory which tends to restrict trade and commerce."²¹¹ This behavior could as easily be classified as the grant of an exclusive territory or an exclusive dealership.

Boycott cases fall into two categories, agreements not to do business with specified persons and agreements to deal only with a certain person. The United States Supreme Court has condemned the first type of boycott where the victim of the boycott is a specific person and the parties to the

203. *Segal v. McCall Co.*, 108 Tex. 55, 59, 184 S.W. 188, 188-89 (1916); *Pram Laboratories, Inc. v. Pram Laboratories-South, Inc.*, 445 S.W.2d 533, 537 (Tex. Civ. App.—Dallas 1969, no writ); *Vann v. Toby*, 260 S.W.2d 114, 117-18 (Tex. Civ. App.—Dallas 1953, writ ref'd n.r.e.); *J.R. Watkins Medical Co. v. Johnson*, 162 S.W. 394, 395 (Tex. Civ. App.—San Antonio 1913, writ ref'd).

204. Both *Climatic Air Distribs. v. Climatic Air Sales, Inc.*, 162 Tex. 237, 345 S.W.2d 702 (1961), and *Patrizi v. McAninch*, 153 Tex. 389, 269 S.W.2d 343 (1954), could have been analyzed as either an exclusive dealing or an exclusive territory case. As with any rule, there is an exception to this statement where the market has fewer buyers than sellers. In such a situation the agreement could be analyzed as an output contract. *Portland Gasoline Co. v. Superior Mktg. Co.*, 150 Tex. 533, 539-40, 243 S.W.2d 823, 827 (1951).

205. See TEX. BUS. & COM. CODE ANN. § 15.03 (Vernon 1968).

206. 550 S.W.2d 401 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.), cert. denied, 435 U.S. 1008 (1978).

207. *Id.* 403-04; see *Albin v. Isotron Corp.*, 421 S.W.2d 739, 743 (Tex. Civ. App.—Texarkana 1967, writ ref'd n.r.e.).

208. See *Wright v. Southern Ice Co.*, 144 S.W.2d 933, 935-36 (Tex. Civ. App.—Texarkana 1940, writ ref'd). Requirements cases have been relied upon as authority for the existence of a rule of reason in Texas, and that authority has been rejected. *Grand Prize Distrib. Co. v. Gulf Brewing Co.*, 267 S.W.2d 906, 908 (Tex. Civ. App.—San Antonio 1954, writ ref'd).

209. TEX. BUS. & COM. CODE ANN. § 15.03(a)(1)-(3) (Vernon 1968); *Griffin v. Palatine Ins. Co.*, 238 S.W. 637, 638 (Tex. Comm'n App. 1922 judgment adopted); *Potomac Fire Ins. Co. v. State*, 18 S.W.2d 929, 933 (Tex. Civ. App.—Austin 1929, writ ref'd); *Star Mill & Elevator Co. v. Fort Worth Grain & Elevator Co.*, 146 S.W. 604, 604-05 (Tex. Civ. App.—Texarkana 1912, writ ref'd).

210. 569 S.W.2d 946 (Tex. Civ. App.—Texarkana 1978, no writ).

211. *Id.* at 949.

agreement are competitors.²¹² Texas courts have also held this type of agreement illegal under the former Texas statute.²¹³ The second type of boycott is in actuality an exclusive territory or exclusive dealing arrangement and is thus per se illegal under the former statute.²¹⁴

Requirements and Output Contracts. Through careful choice of labels, buyers and sellers may achieve by arguably legal means the same results reached by illegal methods. This statement is particularly true in the area of requirements and output contracts. An agreement between a buyer and a seller whereby the buyer agrees to buy all its requirements for a particular product from a particular business could easily violate the literal language of the former Texas antitrust statute because in substance the agreement is an exclusive dealing agreement.²¹⁵ The effect of the agreement, moreover, like that of a boycott or exclusive dealing agreement, is to capture a market for a seller or buyer. An agreement that explicitly provided that the buyer would not purchase the products of a competitor of the seller would clearly be illegal.²¹⁶ Nevertheless, the requirements agreement would probably be upheld by a Texas court.²¹⁷

At first some Texas courts objected to the distinction that permits requirements contracts but forbids exclusive dealing contracts.²¹⁸ In more recent years, however, courts have concluded that a requirements contract that is not exclusive by its terms is legal.²¹⁹ If a court can construe the particular requirements or output clause to permit a theoretical purchase from another seller or sale to another buyer, the clause will be upheld. For

212. *Klors, Inc. v. Broadway Hale Stores*, 359 U.S. 207, 212-13 (1959).

213. See *Celli & Del Papa v. Galveston Brewing Co.*, 227 S.W. 941, 942-43 (Tex. Comm'n App. 1921, judgment adopted); *Hailey v. Brooks*, 191 S.W. 781, 783 (Tex. Civ. App.—Fort Worth 1916, no writ) (boycott "in popular acceptance, may be said to be an organized effort to exclude a person from business relations with others by persuasion, intimidation, or otherwise, and therefore within the meaning of unlawful conspiracies, which will be restrained upon proper application."). An agreement must exist for illegality. *Robinson v. Roberts*, 279 S.W.2d 484, 485 (Tex. Civ. App.—Texarkana 1955, writ ref'd); *Jax Beer Co. v. Palmer*, 150 S.W.2d 452, 453-54 (Tex. Civ. App.—Fort Worth 1941, no writ).

214. Compare *Climatic Air Distribs. v. Climatic Air Sales, Inc.*, 162 Tex. 237, 240-43, 345 S.W.2d 702, 704-05 (1961) (exclusive dealership contract void); *with Albertype Co. v. Gust Feist Co.*, 102 Tex. 219, 221-22, 114 S.W. 791, 792 (1908) (exclusive territory arrangement not subject to state antitrust law); *Wright v. Phillips*, 353 S.W.2d 517, 519 (Tex. Civ. App.—Beaumont 1961, writ ref'd n.r.e.) (exclusive dealing upheld).

215. TEX. BUS. & COM. CODE ANN. § 15.03(a)(1) (Vernon 1968) provides that "[i]t is a conspiracy in restraint of trade for . . . two or more persons engaged in buying or selling tangible personal property to agree not to buy from or sell to another person tangible personal property"

216. *Pram Laboratories, Inc. v. Pram Laboratories-South, Inc.*, 445 S.W.2d 533, 537 (Tex. Civ. App.—Dallas 1969, no writ).

217. See *Wright v. Phillips*, 353 S.W.2d 517, 519 (Tex. Civ. App.—Beaumont 1961, writ ref'd n.r.e.).

218. See *Wood v. Texas Ice & Cold Storage Co.*, 171 S.W. 497 (Tex. Civ. App.—Dallas 1914, no writ). These early cases have been "severely limited if not actually overruled." *State v. Fairbanks-Morse & Co.*, 246 S.W.2d 647, 657 (Tex. Civ. App.—Dallas 1951, writ ref'd n.r.e.).

219. See *Padgitt v. Lone Star Gas Co.*, 213 S.W.2d 133, 137 (Tex. Civ. App.—Dallas 1948, no writ).

example, courts have upheld agreements to buy the gasoline needed for a particular service station,²²⁰ the ice needed for the refrigeration of a store,²²¹ the groceries needed for one member of a chain of stores,²²² the electricity needed for certain, but not all, of a city's needs,²²³ and the turkey feed needed for a particular farm.²²⁴ Similar reasoning has been applied to output contracts.²²⁵ Where a contract simply does not permit an outside sale or purchase, however, the agreement is illegal.²²⁶ Moreover, an agreement not to sell goods of a particular type acquired from sources other than the seller is illegal.²²⁷ Such agreements essentially constitute exclusive dealing arrangements that prohibit a buyer from purchasing a competitor's products.

Location Clauses. A location clause limits the places at which a buyer can use or resell the seller's products. The legality of such a clause should be suspect because the clause limits the purchaser's power to compete wherever he pleases. Moreover, the establishment of various dealers with separate locations may, in practice, create exclusive territories. The restrictive effect of location clauses becomes even greater when those clauses are combined with requirements contracts. Some Texas courts have upheld location clauses, however. For example, in *Ford Motor Co. v. State*²²⁸ the Texas Supreme Court wrote:

The State seems to argue that this provision of the contract is in violation of our anti-trust laws because it limits the number of places of business that a dealer may operate. We overrule this contention. There is nothing in our anti-trust laws which would prevent a manufacturer of automobiles from requiring an authorized dealer in its products to maintain a place of business where the manufactured product would be properly serviced. Such being the case, the manufacturer has the right to contract for the privilege of inspecting such place of business. It certainly cannot be required to inspect as many

220. *Cox, Inc. v. Humble Oil & Ref. Co.*, 16 S.W.2d 285 (Tex. Comm'n App. 1929, judgment adopted); *Montgomery v. Creager*, 22 S.W.2d 463 (Tex. Civ. App.—Eastland 1929, no writ).

221. *Jones Inv. Co. v. Great Atl. & Pac. Tea Co.*, 65 S.W.2d 495 (Tex. Comm'n App. 1933, judgment adopted).

222. *Twaddell v. H.O. Wooten*, 130 Tex. 42, 106 S.W.2d 266 (Tex. Comm'n App. 1937, judgment adopted).

223. *Guadalupe-Blanco River Auth. v. City of San Antonio*, 145 Tex. 611, 200 S.W.2d 989 (1947); *City of Crosbyton v. Texas-New Mexico Utils. Co.*, 157 S.W.2d 418 (Tex. Civ. App.—Amarillo 1941, writ ref'd w.o.m.).

224. *Gandy v. Pillsbury Mills, Inc.*, 235 S.W.2d 470 (Tex. Civ. App.—Austin 1950, writ ref'd).

225. *Portland Gasoline Co. v. Superior Mktg. Co.*, 150 Tex. 533, 243 S.W.2d 823 (1951); *Brown v. Faulk*, 231 S.W.2d 743 (Tex. Civ. App.—San Antonio 1950, no writ).

226. *Wright v. Southern Ice Co.*, 144 S.W.2d 933, 935 (Tex. Civ. App.—Texarkana 1940, writ ref'd).

227. *Turner v. Rhea*, 317 S.W.2d 229, 231 (Tex. Civ. App.—Fort Worth 1958, no writ) (buyer could not sell chinchillas acquired from sources other than seller, but could sell chinchillas he bred).

228. 142 Tex. 5, 175 S.W.2d 230 (1943).

places of business as the dealer may see fit to operate.²²⁹

In *Patrizi v. McAninch*,²³⁰ however, the Texas Supreme Court condemned as violative of Texas antitrust law a clause in which the buyer agreed not to use a certain machine at any location other than the one specified for a period of eight years.²³¹ The two decisions may be distinguished on the grounds that the *Patrizi* contract contained a naked territorial limitation²³² whereas in *Ford Motor Co.* the provision merely raised the issue of whether an exclusive territory had been imposed, and a justification for the location clause was advanced.²³³ The distinction emphasizes the significance of labels and careful drafting under the former Texas antitrust laws.

The requirements clause line of cases also support the conclusion that location clauses are permissible if they do not preclude the buyer from maintaining another location at which he may buy from other sellers for resale or use. For example, in *Wright v. Southern Ice Co.*²³⁴ the court invalidated a requirements clause because it expressly precluded purchases at other locations from other sellers.²³⁵ By contrast, the court upheld the requirements clause in *Cox, Inc. v. Humble Oil & Refining Co.*²³⁶ because the buyer could purchase goods from other sellers for other locations.

Logical analysis cannot fully explain the results reached by the various courts considering the legality of arrangements that restrict the power of a buyer to market a product as it pleases after the product is bought or sold. Such an attempted analysis simply creates confusion and uncertainty as to the legality of a particular transaction under the former Texas antitrust laws. The practical, if not logical, approach is to understand that careful draftsmanship can produce an arrangement that may satisfy the Texas courts.

3. *Exclusivity Under the New Statute.*

The new statute does not simplify analysis of exclusive vertical restraints. As discussed below, exclusive vertical restraints are usually examined under the rule of reason, which means that Texas courts will have to undertake sophisticated economic analysis instead of application of labels.²³⁷ The rule of reason may not apply to all exclusive vertical arrangements, however, because sections 15.05(a) and (c) of the new statute,²³⁸ the counterparts of section 1 of the Sherman Act and section 3 of the Clayton

229. *Id.* at 12, 175 S.W.2d at 234-35.

230. 153 Tex. 389, 269 S.W.2d 343 (1954).

231. *Id.* at 392, 269 S.W.2d at 345-46.

232. 153 Tex. at 392, 269 S.W.2d at 345-46.

233. 142 Tex. at 16, 175 S.W.2d at 237.

234. 144 S.W.2d 933 (Tex. Civ. App.—Texarkana 1940, writ ref'd).

235. *Id.* at 935.

236. 16 S.W.2d 285, 287 (Tex. Comm'n App. 1929, judgment adopted).

237. See *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58-59 (1977). The Supreme Court did not "foreclose the possibility that particular applications of vertical restrictions might justify *per se* prohibition under *Northern Pac. R. Co.* But [it did] make clear that departure from the rule-of-reason standard must be based upon demonstrable economic effect . . ." *Id.*

238. Antitrust Act § 1 (to be codified at TEX. BUS. & COM. CODE ANN. § 15.05(a), (c)).

Act respectively, may apply to a restraint,²³⁹ and certain restraints under either section may involve per se illegality.²⁴⁰

Section 15.05(c) of the new statute has only limited applicability; therefore, most exclusive vertical restraints will be examined only under section 15.05(a). Two factors are very important under section 15.05(a). First, the restraint must actually be vertical;²⁴¹ restraints that may be legal in a vertical context generally are considered per se illegal if the agreement is horizontal, that is, an agreement between competitors.²⁴² Manufacturer/distributor arrangements are normally vertical in nature, and are thus governed by the rule of reason if the manufacturer imposes the restraint.²⁴³ Parties to a particular transaction must assure themselves that it is in fact vertical in nature because if a court finds that restraint results from an agreement between competitors, the mere fact that a manufacturer or supplier is also involved will not require application of the rule of reason.²⁴⁴

The second factor that must be considered when examining an exclusive vertical restraint under section 15.05(a) is, of course, the rule of reason. The United States Supreme Court's decision in *Board of Trade v. United States*²⁴⁵ contains the classic formulation of the rule of reason:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of the intent may help the court to interpret facts and to predict consequences.²⁴⁶

The reasonableness of an exclusive vertical restraint often depends on the

239. The label applied to an agreement may ultimately determine its legality. See *Hyde v. Jefferson Parish Hosp. Dist. No. 2*, 686 F.2d 286 (5th Cir. 1982) (per se illegal tie-in arguably could have been examined as rule of reason exclusive dealing arrangement), *cert. granted*, 103 S. Ct. 1271 (1983).

240. See *Standard Oil Co. v. United States*, 337 U.S. 293 (1949); *Hyde v. Jefferson Parish Hosp. Dist. No. 2*, 686 F.2d 286, 289 (5th Cir. 1982), *cert. granted*, 103 S. Ct. 1271 (1983). But see *United States Steel Corp. v. Fortner Enters.*, 492 U.S. 610, 619-22 (1977).

241. See *H & B Equip. Co. v. International Harvester Co.*, 577 F.2d 239, 245 (5th Cir. 1978).

242. See *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 606-12 (1972); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951). Agreements to divide markets to allocate customers are per se illegal.

243. *Red Diamond Supply, Inc. v. Liquid Carbonic Corp.*, 637 F.2d 1001, 1004-05 (5th Cir. 1981); *H & B Equip. Co. v. International Harvester Co.*, 577 F.2d 239, 246 (5th Cir. 1978).

244. See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

245. 246 U.S. 231 (1918).

246. *Id.* at 238; see also *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 686-92 (1978) (discussion of rule of reason).

effect of the restraint on interbrand and intrabrand competition.²⁴⁷ Location clauses²⁴⁸ and territorial restrictions²⁴⁹ have been upheld under this type of analysis.

Another area of particular concern to manufacturers, suppliers, and distributors is exclusive dealing. A seller need not sell its products to all available customers. As the Ninth Circuit has noted, "There is a veritable avalanche of precedent to the effect that, absent sufficient evidence of monopolization, a manufacturer may legally grant such an exclusive franchise, even if this effects the elimination of another distributor."²⁵⁰ Nevertheless, if a customer and a supplier agree that the supplier will not sell to others in a particular territory or to particular customers, those customer and territorial restrictions will be examined under the rule of reason, according to *Continental T.V., Inc. v. GTE Sylvania Inc.*²⁵¹ and its progeny. Such an arrangement is per se illegal, however, if entered into by persons on the same functional level of distribution, such as competitors.²⁵²

The other phase of exclusive dealing, restraints upon a purchaser's right to purchase from other suppliers, may invoke the tying arrangement prohibitions of sections 15.05(a) and (c), and illegality may result. Analysis of such a situation involves a determination of the probable effect of the arrangement on competition in a relevant market.²⁵³ This analysis can become quite complex, but a finding that the parties have entered into a tying arrangement may lead to the conclusion that an arrangement that otherwise would have been examined under the rule of reason is per se illegal.²⁵⁴

4. Price Discrimination.

The former Texas statute prohibits price discrimination, although the

247. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 54-55 (1977). Sometimes a manufacturer will find it advantageous to impose restrictions, such as assigned territories, on its distributors in order to induce them to undertake advertising or promotional activities, to render more or better services to customers, or simply to push the product more vigorously. *Id.* at 55. By facilitating such efforts on the part of the distributors, the restrictions tend to increase retail sales of the product and may do so on balance even if they also generate some increase in the price the distributors charge. Thus, restrictions on intrabrand competition are sometimes a means whereby a manufacturer can increase interbrand competition. *Id.* at 54-55. Because increasing interbrand competition is generally socially desirable and because intrabrand restrictions are generally not socially harmful when there is significant interbrand competition, manufacturer-imposed, i.e. vertical, restraints are governed by the rule of reason. *See id.* at 54-56.

248. *Golden Gate Acceptance Corp. v. General Motors Corp.*, 597 F.2d 676, 678 n.4 (9th Cir. 1979).

249. *Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d 292, 295 (5th Cir. 1981).

250. *GTE Sylvania Inc. v. Continental T.V., Inc.*, 537 F.2d 980, 997 (9th Cir. 1976) (citing cases), *aff'd*, 433 U.S. 36 (1977).

251. 433 U.S. 36 (1977).

252. *See Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

253. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); *see Standard Oil Co. v. United States*, 337 U.S. 293 (1949) (substantial amount of commerce no longer appears to be sufficient).

254. *See Hyde v. Jefferson Parish Hosp. Dist. No. 2*, 686 F.2d 286 (5th Cir. 1982), *cert. granted*, 103 S. Ct. 1271 (1983).

provisions were not used in any reported civil cases. Former section 15.06 prohibits tying arrangements whereby a wholesaler requires a retailer to purchase or accept a particular publication in order to obtain another publication.²⁵⁵ Former section 15.33, violation of which constitutes a felony, prohibits doing the following with "an intent to drive out competition or financially injure a competitor": (1) selling a product below the cost of its manufacture or production, (2) giving away a product, or (3) granting a secret rebate on the price of a product.²⁵⁶ The old statute contains no prohibition against discrimination at the customer level. The new statute, by contrast, contains no provisions whatsoever specifically prohibiting price discrimination.²⁵⁷

5. *Exceptions to Illegality.*

Although Texas courts have rejected the application of a rule of reason under the former statute, those courts have restricted application of the statute when a particular transaction is simply not injurious. These exceptions to the Texas antitrust laws will shelter the transaction. The two common exceptions to the Texas antitrust laws are patents, trademarks, and copyrights; and leases. Parties have also attempted to create contractual exceptions. With the amendment of the Texas antitrust statute, all of these exceptions have lost significance. They warrant discussion, however, because they aid comprehension of the former statute and because principles found in cases involving such exceptions might be invoked under the new statute.

Contractual Provisions. The provision that gave the former statute most of its teeth was section 15.04(b),²⁵⁸ which voided contracts containing illegal clauses. The new statute does not contain a similar provision. Presumably, contracts containing illegal provisions will henceforth be governed by the United States Supreme Court's holding in *Kelly v. Kosuga*.²⁵⁹ In that case the Supreme Court stated:

Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the [Sherman] Act, the

255. *Id.* In *Sanborn v. Palm*, 336 F. Supp. 222 (S.D. Tex. 1971), the court considered whether the Sherman Act applied to an insurance agent in spite of the language of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1976). The court concluded that TEX. BUS. & COM. CODE ANN. § 15.03 (Vernon 1968), applied literally, would prohibit tying agreements. 336 F. Supp. at 228. No other case has addressed the issue. There is now no question that tying arrangements are regulated by the Texas antitrust laws. Antitrust Act § 1 (to be codified at TEX. BUS. & COM. CODE ANN. § 15.05(c)).

256. TEX. BUS. & COM. CODE ANN. § 15.33(b) (Vernon 1968).

257. The new Texas antitrust statute will probably have limited application because, except to a minor degree, it merely sanctions behavior already subject to the federal antitrust provisions after which the statute is patterned. Because of the narrower scope of the federal price discrimination statute, *see Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974), the Texas Legislature could have had a significant impact on Texas commerce had it adopted a prohibition comparable to 15 U.S.C. § 13 (1976).

258. TEX. BUS. & COM. CODE ANN. § 15.04(b) (Vernon 1968).

259. 358 U.S. 516 (1959).

courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, "of preventing people from getting other people's property for nothing when they purport to be buying it."²⁶⁰

Because the former statute voided contracts containing illegal clauses, parties often attempted to avoid the Draconian effect of an illegal clause. A clause commonly found in sales contracts disavows and attempts to negate any clause of the contract that may later be found illegal. Such clauses do not prevent a contract from being voided by former section 15.04.²⁶¹ In *Patrizi v. McAninch*²⁶² the Texas Supreme Court considered the argument that a contract provision severing illegal clauses should save an otherwise void contract. The supreme court rejected the argument and held that:

If a party may thus eliminate parts of an agreement which may well have been the vital and inducing cause for its execution by the other party, the while retaining the right to enforce the consideration for the eliminated parts, the antitrust laws will become a hollow symbol of a dead era.²⁶³

A choice of law clause may also impact upon the legality of a particular agreement. Texas courts will ignore a choice of law provision if it has the effect of legitimizing activity otherwise violative of the Texas antitrust statutes. The Texas Supreme Court has held that "state courts ordinarily will not enforce rights existing under laws of other jurisdictions when to do so would violate the public policy of the state of the forum."²⁶⁴ The Texas antitrust statutes reflect public policy.

Leases. The absence of a rule of reason under the former statute caused the courts to attempt to narrow the range of the statute by creating exceptions. The new statute does not contain these exceptions, and they will

260. *Id.* at 520-21.

261. *See* *Patrizi v. McAninch*, 153 Tex. 389, 396-97, 269 S.W.2d 343, 348 (1954).

262. 153 Tex. 389, 269 S.W.2d 343 (1954).

263. *Id.* at 395, 269 S.W.2d at 347; *see also* *Ford Motor Co. v. State*, 142 Tex. 5, 8-9, 175 S.W.2d 230, 233 (1943); *supra* notes 59-62 and accompanying text.

Interestingly, the concurrence and dissent in *Patrizi* disagreed on the meaning of the majority's holding. Justice Wilson, concurring, believed the majority held that a severability clause might save some agreements, and wanted a rule that all contracts containing an illegal clause are "absolutely void." *Id.* at 397-98, 269 S.W.2d at 349. The dissent, written by Justice Griffin, apparently believed the majority adopted an absolute voidness rule. *Id.* at 399, 269 S.W.2d at 350. Subsequent decisions appear to agree with Justice Griffin's interpretation. *See* *Graphilter Corp. v. Vinson*, 518 S.W.2d 952, 955 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.); *Lawler v. Aramco*, 447 S.W.2d 189, 193 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.).

264. *Marketers Int'l, Inc. v. E.F.I., Inc.*, 506 S.W.2d 579, 580 (Tex. 1974) (per curiam). *Compare* *Hachett v. Williams*, 437 S.W.2d 334, 338 (Tex. Civ. App.—Houston [1st Dist.] 1968, writ ref'd n.r.e.) (in breach of contract suit defendant Texas corporation that asserted its contract to buy exclusively from plaintiff for defendant's Shreveport, Louisiana, store violated federal, Texas, and Louisiana antitrust laws; using conflict of laws analysis court applied Louisiana law), *cert. denied*, 396 U.S. 963 (1969); *with* *J.R. Watkins Co. v. McMullan*, 6 S.W.2d 823, 824 (Tex. Civ. App.—Austin 1928, no writ) (contract was performable in Oklahoma; Texas court assumed Oklahoma law was same as Texas law and found contract void).

probably not be necessary so long as the rule of reason applies. The principal exception to the prohibitions of the former Texas statute deals with restrictive lease covenants covering real or personal property. The Texas Supreme Court noted in *Schnitzer v. Southwest Shoe Corp.*²⁶⁵ that:

The rigidity of our anti-trust, monopoly and restraint of trade statutes has undoubtedly been softened in certain exceptional situations. One of the exceptional situations is that in which an owner, lessor or one in control of premises agrees with another person that the other person shall have an exclusive right or privilege in or on the premises or that the other person will sell on the premises only the products or merchandise of the owner or lessor. Contracts or agreements of this character are upheld when they are collateral or incidental to a lawful lease or grant of premises in which the lessor or grantor has a property interest.²⁶⁶

A common restriction imposed upon a lessor precludes competition between the lessee and the lessor or others leasing property from the lessor.²⁶⁷ The central issue concerns who may be bound by such a lease provision. In *City Products Corp. v. Berman*²⁶⁸ the lessee sought to enforce a restrictive clause against Berman, one of nine partners in a limited partnership that was the lessor of the restricted premises. All nine partners had signed the lease, although Berman had no individual ownership interest in the property. Berman sought to lease a parcel of property he owned, in contravention of the lease agreement. The Texas Supreme Court enforced the restrictive provision and held that Berman, as a limited partner, owned a vendible property interest in the partnership lease to which the restriction could properly attach.²⁶⁹

Similar restrictive lease provisions are invalid when they attempt to bind a party with no interest in the leased property.²⁷⁰ In *Schnitzer v. Southwest Shoe Corp.*²⁷¹ the lessor and a neighboring merchant, Alford, who desired to join with the lessor in the joint development of a shopping center, signed the restrictive lease. Since Alford had no interest in the property, the clause was invalid.²⁷² Similarly, in *Kroger Co. v. J. Weingarten, Inc.*²⁷³ the court held invalid a lease executed by the lessor and also by an individual, Sharp, and his wholly owned corporation. Although Sharp allegedly con-

265. 364 S.W.2d 373 (Tex. 1963).

266. *Id.* at 374-75 (citations omitted).

267. *City Prods. Corp. v. Berman*, 610 S.W.2d 446, 448 (Tex. 1981); see *Karam v. H.E. Butt Grocery Co.*, 527 S.W.2d 481, 483-84 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.); *Neiman Marcus Co. v. Hexter*, 412 S.W.2d 915, 917 (Tex. Civ. App.—Dallas 1967, writ ref'd n.r.e.); *Star Ref. Co. v. Butcher*, 84 S.W.2d 303, 306 (Tex. Civ. App.—Fort Worth 1935, no writ); *Edwards v. Old Settlers' Ass'n*, 166 S.W. 423, 426 (Tex. Civ. App.—Austin 1914, writ ref'd); *Redland Fruit Co. v. Sargent*, 113 S.W. 330, 331 (Tex. Civ. App. 1908, no writ). This restriction is similar to covenants not to compete in the employment context.

268. 610 S.W.2d 446 (Tex. 1981).

269. *Id.* at 449.

270. *Schnitzer v. Southwest Shoe Corp.*, 364 S.W.2d 373, 375 (Tex. 1963); *Kroger Co. v. J. Weingarten, Inc.*, 380 S.W.2d 145, 150 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.).

271. 364 S.W.2d 373 (Tex. 1963).

272. *Id.* at 375.

273. 380 S.W.2d 145 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.).

trolled the lessor, the court concluded that Sharp and his corporation owned no vendible interest in the leased premises to which a restriction could attach.²⁷⁴

Courts have upheld restrictions on lessees under certain circumstances. For example, the lessee of a service station can be required to buy lessor's products exclusively,²⁷⁵ and the lessor of equipment can restrict the beer bought and sold by lessee.²⁷⁶ Parties to such agreements must beware of overstepping the bounds of the lease and seeking to bind the lessee on business not encompassed by the lease. In *Wright v. Southern Ice Co.*²⁷⁷ the lessor attempted to require the lessee to use only the lessor's products on the leased property, and also attempted to restrict other elements of the lessee's business. The court held the restriction invalid because it applied to property other than the leased property.²⁷⁸

Patents, Copyrights, and Trademarks. The United States Constitution vests Congress with the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."²⁷⁹ Pursuant to this constitutional provision, Congress has enacted the Patent Code²⁸⁰ and the Copyright Code.²⁸¹ Congress has also enacted the Lanham Trademark Act.²⁸² The granting or rejection of a patent, trademark, or copyright request can determine the legality in Texas of restrictions placed on the sale of products covered by the patent, trademark, or copyright.²⁸³

Texas courts have concluded that the owner of a patent, copyright, or trademark may impose restraints upon his assignee without running afoul of the former Texas antitrust statute.²⁸⁴ When dealing with patents, trademarks, and copyrights, however, one must remember that merely because a restriction is excepted from application of the former Texas statute does not mean that the federal antitrust statutes will not apply.²⁸⁵ Now that the

274. *Id.* at 150, 152-53.

275. *Champlin Ref. Co. v. Street*, 57 S.W.2d 903 (Tex. Civ. App.—Amarillo 1933, no writ); *State v. Gulf Ref. Co.*, 279 S.W. 526 (Tex. Civ. App.—Austin 1926, writ ref'd).

276. *Celli & Del Papa v. Galveston Brewing Co.*, 227 S.W. 941, 942-43 (Tex. Comm'n App. 1921, opinion adopted). Care must be taken in this area under federal law. *See T.F.C. v. Texaco, Inc.*, 393 U.S. 223 (1968); 16A J. VON KALINOWSKI, *supra* note 37, ch. 6G.

277. 144 S.W.2d 933 (Tex. Civ. App.—Texarkana 1940, writ ref'd).

278. *Id.* at 935-36.

279. U.S. CONST. art. I, § 8, cl. 8.

280. 35 U.S.C. §§ 1-307 (1976 & Supp. V 1981).

281. 17 U.S.C. §§ 1-216 (1976 & Supp. V 1981).

282. 15 U.S.C. §§ 1051-1127 (1976 & Supp. V 1981).

283. *See Hall v. Hall*, 326 S.W.2d 594, 601 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.); *American Ref. Co. v. Gasoline Prods. Co.*, 294 S.W. 967, 973 (Tex. Civ. App.—Fort Worth 1927, writ ref'd) (application of federal antitrust law).

284. *E.F.I., Inc. v. Marketers Int'l, Inc.*, 492 S.W.2d 302, 306 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.). *But see Vann v. Toby*, 260 S.W.2d 114, 117-18 (Tex. Civ. App.—Dallas 1953, writ ref'd n.r.e.).

285. The application of federal antitrust laws to patents, trademarks, and copyrights can be complex. Suffice it to say that the patent, trademark, and copyright laws do not provide a blanket exemption to the federal antitrust laws. *See* 16F J. VON KALINOWSKI, *supra* note 37, ch. 59.

Texas antitrust statute has been amended Texas courts will have to consider the knotty issues arising from the interrelationship between antitrust law and patent, trademark, and copyright law.

The crucial question under the old statute is whether an article has been sold, or whether a patent, trademark or copyright has been assigned.²⁸⁶ The owner of a patent, trademark, or copyright may impose upon the assignee restrictions covering the price at which the article may be sold, the territory in which it may be manufactured and sold, and the material that may be used in its manufacture.²⁸⁷ The owner of an article protected by a patent, trademark, or copyright cannot impose similar restrictions upon his vendee, however.²⁸⁸ Two cases demonstrate the significance, under the repealed statute, of a finding that a product has been sold. In *Patrizi v. McAninch*²⁸⁹ the plaintiff sought to recover royalty payments due under a contract for a patented custard maker. The contract placed various restrictions upon the plaintiff's right to sell other machines and the buyer's right to use the machine. These restrictions were unquestionably illegal in the absence of an exception from the antitrust laws. The Texas Supreme Court rejected the assertion that the royalties were paid for the use of a tradename, connected the royalties to the purchase of the machine, and held the contract illegal.²⁹⁰ In *Shaddock v. Grapette Co.*²⁹¹ the plaintiff sought to recover for bottling machinery and three trucks that it had sold to its franchisee. The franchise contract under which the machinery and trucks were purchased contained a number of restrictions that, absent an exemption, were illegal under the Texas antitrust laws. Unlike the Texas Supreme Court in *Patrizi*, however, the court construed the restrictions in the franchise contract to relate to the use of the defendant's tradename. The contract thus did not violate the Texas antitrust laws.²⁹²

C. Nonstatutory Antitrust Prohibitions

One area of Texas antitrust law should be considered nonstatutory in nature and thus should remain unchanged by the new statute. Cases involving covenants not to compete, which are probably the most common subject of Texas antitrust lawsuits, do not rely upon the former statute and

286. The distinction is less significant with the new statute because if the product has been sold, any nonprice restraint is a vertical restraint examined under the rule of reason.

287. *Coca Cola Co. v. State*, 225 S.W. 791 (Tex. Civ. App.—Austin 1920, no writ).

288. *Id.* at 793 (citations omitted); see *E.F.I., Inc. v. Marketers Int'l, Inc.*, 492 S.W.2d 302, 306-07 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.); *Smith v. Waite*, 424 S.W.2d 691, 693 (Tex. Civ. App.—Waco 1968, writ ref'd n.r.e.); *Rogers v. Westinghouse Elec. Supply Co.*, 116 S.W.2d 886, 887-88 (Tex. Civ. App.—Dallas 1938, writ ref'd); *National Automatic Mach. Co. v. Smith*, 32 S.W.2d 678, 680 (Tex. Civ. App.—Austin 1930, no writ); *Lock v. Citizens' Nat'l Bank*, 165 S.W. 536, 538 (Tex. Civ. App.—Amarillo 1914, writ dism'd).

289. 153 Tex. 389, 269 S.W.2d 343 (1954).

290. *Id.* at 396, 269 S.W.2d at 348.

291. 259 S.W.2d 231 (Tex. Civ. App.—Waco 1953, no writ).

292. *Id.* at 235. Merely because a transaction states the restriction is in connection with a patent, trademark, or copyright will not be sufficient if the trademark simply does not have the value to warrant such a restriction and the product does. *Id.*

can involve subjects beyond the scope of the statute.²⁹³ Covenants not to compete could be construed to violate a number of the provisions of the former Texas antitrust statutes,²⁹⁴ but the Texas Supreme Court concluded long ago that the sale of a business, accompanied by a restrictive covenant, does not constitute a combination.²⁹⁵ Similarly, an employer and an employee cannot combine.²⁹⁶ Today courts accept restrictive covenants if they are ancillary to some other valid transaction.²⁹⁷ Covenants not to compete have been upheld when ancillary to leases,²⁹⁸ employment contracts,²⁹⁹ and contracts for the sale of a business.³⁰⁰ Courts have been reluctant to extend the permissible scope of covenants not to compete to new areas, although the Texas Supreme Court may have done so in *Justin Belt Company, Inc. v. Yost*.³⁰¹ In that case the Texas Supreme Court enforced a covenant not to compete that was included in a settlement agreement.

The breach of a restrictive covenant can result in an award of injunctive relief or damages. Although the basic standards used to determine the validity of restrictive covenants apply to both damages and injunctive relief, the manner in which the standards are applied to the two forms of relief differs. The Texas Supreme Court set forth the guidelines for reviewing restrictive covenants in *Weatherford Oil Tool Co. v. Campbell*,³⁰² holding that:

An agreement on the part of an employee not to compete with his employer after termination of the employment is in restraint of trade and will not be enforced in accordance with its terms unless the same are reasonable. Where the public interest is not directly involved, the test usually stated for determining the validity of the covenant as writ-

293. See *Cawse-Morgan v. Murray*, 633 S.W.2d 348 (Tex. App.—Corpus Christi 1982, no writ) (employment agency); *AMF Tuboscope v. McBryde*, 618 S.W.2d 105 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.) (inspection and testing of oil field pipes). The restrictions permitted in leases are closely related to covenants not to compete. Lease restrictions, however, encompass behavior beyond that permitted by noncompetition clauses.

294. See *Gates v. Hooper*, 90 Tex. 563, 39 S.W. 1079 (1897); TEX. BUS. & COM. CODE ANN. §§ 15.02(b)(3), 15.02(b)(7), 15.03(a) (Vernon 1968).

295. *Gates v. Hooper*, 90 Tex. 563, 39 S.W. 1079, 1080 (1897); see *Cunningham v. Frito Co.*, 198 S.W.2d 772, 775 (Tex. Civ. App.—San Antonio 1946, no writ); cf. *Comer v. Burton-Lingo Co.*, 58 S.W. 969 (Tex. Civ. App. 1900, no writ) (combination found to exist because non-competition clause was granted in connection with sale of business to more than one person or firm).

296. See *Padgitt v. Lone Star Gas Co.*, 213 S.W.2d 133, 136 (Tex. Civ. App.—Dallas 1948, no writ).

297. *Justin Belt Co. v. Yost*, 502 S.W.2d 681, 683 (Tex. 1973); *Brooks Gas Corp. v. Sinclair Oil & Gas Co.*, 408 S.W.2d 747, 753 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.); *Smith v. Kousiakos*, 172 S.W. 586, 586 (Tex. Civ. App.—El Paso 1915, no writ). If a covenant is not ancillary to a valid transaction, the covenant is illegal. See *Graphilter Corp. v. Vinson*, 518 S.W.2d 952 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.).

298. See *City Prods. Corp. v. Bernam*, 610 S.W.2d 446 (Tex. 1980).

299. *Weatherford Oil Tool Co. v. Campbell*, 161 Tex. 310, 340 S.W.2d 950 (1960).

300. *Stocks v. Banner Am. Corp.*, 599 S.W.2d 665 (Tex. Civ. App.—Texarkana 1980, no writ).

301. 502 S.W.2d 681, 684 (Tex. 1973). The Texas Supreme Court approved a restrictive covenant that "[n]ot only was . . . ancillary to a permissible transaction . . . ; it was ancillary to an agreement highly favored by the courts." *Id.*

302. 161 Tex. 310, 340 S.W.2d 950 (1960).

ten is whether it imposes upon the employee any greater restraint than is reasonably necessary to protect the business and good will of the employer. . . . The period of time during which the restraint is to last and the territory that is included are important factors to be considered in determining the reasonableness of the agreement.³⁰³

If a covenant satisfies these standards an injured party can recover damages for breach of the covenant,³⁰⁴ but money damages cannot be recovered for breach of an unreasonable covenant.³⁰⁵ The Texas Supreme Court recently held that "[f]or purposes of monetary damages, a restrictive covenant must stand or fall as written."³⁰⁶

The same rule does not apply to requests for injunctive relief,³⁰⁷ because an employee can obtain a judicial ruling before his competitive activities are challenged. Texas courts will modify restrictive covenants by reducing the time period and territory covered by the covenant to reasonable levels, and will then enforce the covenant as modified.³⁰⁸ The courts' views on what is reasonable in a given situation, however, vary widely. For example, one court will enforce a covenant containing an unlimited territory,³⁰⁹ while another court will allow only a territory with a one-hundred-mile radius,³¹⁰ and a third court will limit the territory to the particular business and customers of the plaintiff.³¹¹ The time period considered reasonable varies from six months³¹² to seven years.³¹³ The lesson to be learned from

303. *Id.* at 312-13, 340 S.W.2d at 951.

304. *See* Professional Beauty Prods., Inc. v. Derington, 513 S.W.2d 236 (Tex. Civ. App.—El Paso 1974, writ ref'd n.r.e.).

305. Weatherford Oil Tool Co. v. Campbell, 161 Tex. 310, 314-15, 340 S.W.2d 950, 953 (1960).

306. Frankiewicz v. National Comp Assocs., 633 S.W.2d 505, 507 (Tex. 1982).

307. The standards for obtaining a temporary injunction in a restrictive covenant case are the same as in nonantitrust cases. The injunction preserves the status quo upon a showing of a probable injury and a probable right to recover on final trial. AMF Tuboscope v. McBryde, 618 S.W.2d 105, 107 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.); *see* Sun Oil Co. v. Whitaker, 424 S.W.2d 216, 218 (Tex. 1968); Transport Co. v. Robertson Transps., 152 Tex. 551, 556, 261 S.W.2d 549, 552 (Tex. 1953). *But see* Leck v. Employers Casualty Co., 635 S.W.2d 450, 453 (Tex. App.—Fort Worth 1982, no writ) ("To establish a right to the issuance of a temporary injunction the applicant must show immediate and irreparable injury, the absence of an adequate legal remedy, and a probable right to recovery."). The existence of a reasonable covenant and an admitted breach will normally render the denial of injunctive relief an abuse of discretion. *See* Investors Diversified Servs. v. McElroy, 645 S.W.2d 338, 339 (Tex. App.—Corpus Christi 1982, no writ); AMF Tuboscope v. McBryde, 618 S.W.2d 105, 108 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.); Hartwell's Office World, Inc. v. Systex Corp., 598 S.W.2d 636, 640 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.); Weed Eater, Inc. v. Dowling, 562 S.W.2d 898, 902 (Tex. Civ. App.—Houston [1st Dist.] 1970, writ ref'd n.r.e.).

308. Weatherford Oil Tool Co. v. Campbell, 161 Tex. 310, 314, 340 S.W.2d 950, 952 (Tex. 1960).

309. Weed Eater, Inc. v. Dowling, 562 S.W.2d 898, 902 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.).

310. AMF Tuboscope v. McBryde, 618 S.W.2d 105, 108 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.).

311. Stocks v. Banner Am. Corp., 599 S.W.2d 665, 668 (Tex. Civ. App.—Texarkana 1980, no writ).

312. Bob Pagan Ford, Inc. v. Smith, 638 S.W.2d 176, 179 (Tex. App.—Houston [1st Dist.] 1982, no writ).

313. Justin Belt Co. v. Yost, 502 S.W.2d 681, 685-86 (Tex. 1973). The question of the

these cases is that one must attempt to tailor covenants so that they satisfy the needs of the employer without unduly burdening the employee.³¹⁴ Failure to draft a reasonable covenant will lead to modification of the covenant³¹⁵ and possibly to a refusal to enforce the covenant at all.³¹⁶

IV. CONCLUSION

This Article was originally written before the passage of the new Texas antitrust statute. The original Article concluded that the existing statute was in drastic need of amendment or repeal, and advocated passage of a rational statute that would better fit the needs of Texas businesses and consumers. Without doubt, the new statute has removed much of the confusion that existed under the former statute. One may wonder, however, whether the Texas Legislature thoroughly considered the needs of businesses and consumers before passing the new statute. A reading of the new statute leaves one feeling that the Texas Legislature simply took the path of least resistance.

The original proposal for a new Texas antitrust statute differed dramatically from the statute that was ultimately passed. The legislature deleted controversial provisions such as those dealing with mandatory treble damages, premerger notification, and the forfeiture of corporate charters for violations, as well as language providing that the new statute should be liberally construed. A provision was added allowing the recovery of attorneys' fees by a defendant if a case is brought in bad faith or for the purpose of harassment. Presumably the legislature intended this provision to discourage private litigants from using the statute. Ultimately, therefore, the bill succeeded because its sponsors were willing to eliminate or alter most of the provisions that others found objectionable. As a result, the new statute does little for Texas businesses and consumers other than to parrot

permissible duration of a restrictive covenant raises an interesting problem. An employee may be breaching a covenant, but any injunctive relief may be useless if the remaining term of the restriction is short. For example, in *Hallmark Personnel of Texas, Inc. v. Franks*, 562 S.W.2d 933 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ), the appellate court did not have to consider the reasonableness of a six-month restrictive covenant because the term expired during the pendency of the appeal, rendering the issue moot. Drafters have attempted to circumvent this problem by providing the restrictive term begins upon the employee's termination, or if the clause is violated, upon cessation of the violation, whether voluntarily or by injunction. Unfortunately, the two courts of appeal directly considering such a clause have declared it void. *Cawse-Morgan v. Murray*, 633 S.W.2d 348, 350 (Tex. App.—Corpus Christi 1982, no writ); *Cardinal Personnel, Inc. v. Schneider*, 544 S.W.2d 845, 847 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ); *cf. Arrow Chem. Corp. v. Pugh*, 490 S.W.2d 628, 633 (Tex. Civ. App.—Dallas 1972, no writ) (clause enforced, but no evidence or brief submitted by defendant).

314. See *Leck v. Employers Casualty Co.*, 635 S.W.2d 450, 453 (Tex. App.—Fort Worth 1982, no writ); *AMF Tuboscope v. McBryde*, 618 S.W.2d 105, 108 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.).

315. See *Matlock v. Data Processing Sec., Inc.*, 618 S.W.2d 327, 329 (Tex. 1981); *Bob Pagan Ford, Inc. v. Smith*, 638 S.W.2d 176, 178-79 (Tex. App.—Houston [1st Dist.] 1982, no writ).

316. See *Cawse-Morgan v. Murray*, 633 S.W.2d 348, 350 (Tex. App.—Corpus Christi 1982, no writ).

federal antitrust provisions that are already applicable to most phases of Texas business.

This is not to say that the achieved result does not benefit Texas consumers. On the contrary, the author believes that the Texas Legislature properly focused on designing a counterpart to section 1 of the Sherman Act. However, the Texas Legislature should consider other antitrust proposals, including those from other states, and should not merely eliminate antitrust provisions that various groups find objectionable. For example, some states allow recovery by indirect purchasers.³¹⁷ Other states prohibit various forms of price discrimination, which theoretically aids small businessmen.³¹⁸ Further, the prohibitions against exclusivity in the former statute, if applied more rationally, might still provide aid to Texas businessmen and consumers. The Texas Legislature, the Texas bar, and other interested groups should make an effort to determine what antitrust provisions would best meet the needs of Texas consumers and businesses. Once those needs are determined antitrust provisions can be more rationally adopted or rejected.

317. See CAL. BUS. & PROF. CODE § 16750 (West Supp. 1983). *But see* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

318. See N.M. STAT. ANN. §§ 57-14-1 to -9 (1978); OKLA. STAT. ANN. tit. 79, §§ 2, 6 (West 1976).